Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

OFFICE OF THE CLERK

October Term, 1993

In re: CONTINENTAL AIRLINES, INC., *et al.*,

Debtors.

PATRICIA BEER, MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER, COLORADO,

Petitioner,

v.

CONTINENTAL AIRLINES, INC., *et al.*,*

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in construing the provisions of the Colorado Constitution by its finding that curative tax legislation, which was enacted on August 9, 1991, and made retroactively effective to February 1, 1991, in order to clarify a prior tax exemption ordinance, violated the Colorado Constitution's prohibition against the passing of retrospective laws.

2. Whether the Court of Appeals erred in rendering its decision by its failure to apply legislative intent when construing a tax exemption ordinance, and by its finding that legislative intent is not controlling over the plain meaning and common-usage-of-words, in direct conflict with the decisions of other courts of appeals, of this Court, and with decisions of Colorado courts.

LIST OF PARTIES

The Petitioner is: PATRICIA BEER, MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER, COLORADO.

The Respondents are: CONTINENTAL AIRLINES, INC.; CONTINENTAL AIRLINES HOLDINGS, INC.; CHELSEA CATERING CORPORATION; CML HOLDINGS, INC.; TAC 301 CORPORATION; TAC 302 CORPORATION; TAC 303 CORPORATION; TAC 304 CORPORATION; TAC 306 CORPORATION; TAC 307 CORPORATION; TAC 309 CORPORATION; TAC 312 CORPORATION; TAC 313 CORPORATION; TAC 314 CORPORATION; TAC 315 CORPORATION; TAC 318 CORPORATION; TAC 319 CORPORATION; TAC 320 CORPORATION; TAC 321 CORPORATION; TAC 322 CORPORATION; TAC 325 CORPORATION; TAC 326 CORPORATION; TAC 327 CORPORATION; TAC 328 CORPORATION; TAC 329 CORPORATION; TAC 330 CORPORATION; TAC 331 CORPORATION; TAC 332 CORPORATION; TAC 333 CORPORATION; TAC 334 CORPORATION; TAC 376 CORPORATION; TAC 401 CORPORATION; TAC 402 CORPORATION; TAC 811 CORPORATION; TAC 818 CORPORATION; TAC 819 CORPORATION; TAC 820 CORPORATION; TAC 823 CORPORATION; TAC 833-834 CORPORATION; TAC 835 CORPORATION; TAC FUEL MANAGEMENT, INC.; TEXAS AIR LEASING CORPORATION; BRITT AIRWAYS, INC.; ROCKY MOUNTAIN AIRWAYS, INC.; CONTINENTAL AIRLINES HISTORICAL SOCIETY, INC.; CONTINENTAL AIR MANAGEMENT SERVICES, INC.; CONTINENTAL-TRUK HOTEL CORPORATION; FRONTIER AIRLINES,

LIST OF PARTIES – Continued

INC.; NEW YORK AIRLINES, INC.; SYSTEM ONE HOLDINGS, INC.; SYSTEM ONE TRAVEL RESOURCES, INC.; SYSTEM ONE DIRECT ACCESS, INC.; MAXPIU INTERNATIONAL, INC.; AND THOMAS E. ROSS, UNITED STATES TRUSTEE.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

The Manager of Revenue for the City and County of Denver, Colorado (hereafter "Denver"), by and through the undersigned counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit ("court of appeals") in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A1-A24) is unreported. The opinion of the United States District Court for the District of Delaware ("district court") is reported at *In re Continental Airlines, Inc.*, 23 Bankr. Ct. D. 1499, 149 B.R. 76 (D.Del. 1993) (App. C1-C34), and the opinion of the United States Bankruptcy Court for the District of Delaware ("bankruptcy court") is reported at *In re Continental Airlines, Inc.*, 138 B.R. 430 (Bkrtcy.D.Del. 1992) (App. D1-D20), *rev'd*, 23 Bankr. Ct. D. 1499, 149 B.R. 76 (D.Del. 1993) (App. C1-C34).

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1993, and petition for panel rehearing was denied on October 21, 1993 (App. A1-A24; B1-B3). The court of appeals stayed the issuance of the mandate on November 17, 1993 (App. B4). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) (1940 ed.).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The relevant portions of Denver Ordinance, No. 75, Series of 1991, as originally enacted on February 1, 1991, and as amended by curative Denver Ordinance No. 568, which was enacted on August 9, 1991, and made retroactively effective to February 1, 1991, are set forth in the Appendix, F1-F3; G1-G5 (codified in Denver Revised

Municipal Code ("Den. Rev. Mun. C.") Sections 53-97(16) and (17)).[1] The provisions of Article II, Section 11, and Article XV, Section 12, of the Colorado Constitution read as follows:

> No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly. [Colo. Const., Art. II, § 11.]
>
> The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation. . . . [Colo. Const., Art. XV, § 12.]

Denver has complete autonomy in enactment of purely local excise taxes, to the exclusion of state laws; thus, no Colorado statutes are involved in this matter. *Security Life and Accident Co. v. Temple*, 177 Colo. 14, 492 P.2d 63, 64 (1972).[2]

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[1] The language in the August Exemption was also enacted prospectively through the enactment of Denver Ordinance No. 571, Series of 1991 (App. H1-H4).

[2] The bankruptcy court, in interpreting Denver Ordinance No. 75, relied, in part, on a state statute that is expressly not applicable to airlines (App. D13), citing Colo. Rev. Stat. § 39-22-508.2(2)(a) (1991 Supp.). Section 39-22-508.3(4), Colo. Rev. Stat., provides that the Act is not available to public utilities: "No credit shall be allowed under this section for the establishment or expansion of a public utility, as such term is defined in section 40-1-103, C.R.S. 1973." Section 40-1-103(1)(a), Colo. Rev. Stat., states "The term public utility . . . includes every common carrier . . . ", and Section 40-1-102(3), Colo. Rev. Stat., defines "common carrier" as meaning "every person

STATEMENT OF FACTS

1. This case involves the tax liability of Continental Airlines, Inc. ("Continental") for Denver use tax incurred during the period from May 1, 1991 to August 8, 1991.

The Denver use tax is an excise tax levied on the exercise of the privilege of using, storing, distributing, or consuming tangible personal property in Denver by an individual or entity (App. I1). Den. Rev. Mun. C. § 53-92(a). The tax is not imposed on purchases of personal property, as such, but on the privilege of use after a retail sale. The price of purchases made in, or brought into, Denver is merely the usual base for measuring the tax on the exercise of the privilege. *Walgreen Co. v. Charnes*, 859 P.2d 235, 241 (Colo.App. 1992), *cert. denied* (Sept. 27, 1993); (citing Den. Rev. Mun. C. § 53-92(a))(App. I1); see also *East Ohio Gas Co. v. Limbach*, 26 Ohio St.3d 63, 498 N.E.2d 453, 456 (1986).

Continental operates a commercial airline at Stapleton International Airport ("Stapleton Airport") located in the City and County of Denver in leased facilities that consist of ticket counters and office space utilized in the main terminal, space in terminal concourses, and leased buildings used for airplane maintenance and storage. (App. A4). On December 3, 1990, Continental filed its petition in the bankruptcy court under Chapter 11 of the Bankruptcy Code. After its bankruptcy filing, Continental

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directly or indirectly affording a means of transportation . . . within this state by railroad, motor vehicle, aircraft, or other vehicle . . . for compensation. . . . "

continued normal airline-related business and operational activities at Stapleton Airport, and continued to incur Denver taxes.

2. On August 20, 1991, Denver filed in the bankruptcy court its motion for payment of administrative expenses pursuant to 11 U.S.C. § 503 (1978 ed.) for delinquent use taxes owed by Continental for May and June of 1991. Denver thereafter filed its first amended motion for payment of administrative expenses on October 4, 1991, to include delinquent use taxes for the remaining period of July 1, 1991, to August 8, 1991. The motion for payment and amended motion for payment are the basis for federal jurisdiction in the court of first instance. 11 U.S.C. § 503, 11 U.S.C. § 505 (1978 ed.). Denver's first amended motion for payment was denied by the bankruptcy court. *In Re Continental Airlines, Inc., supra,* 138 B.R. 430, 435-37 (App. D19).

3. Earlier, on February 1, 1991, the Denver City Council ("City Council") had enacted a new exemption from Denver's use tax by Ordinance No. 75, Series of 1991 (hereafter the "February Exemption" or "Ordinance No. 75") (App. F1-F3). The City Council concurrently enacted a parallel occupational privilege tax exemption by Ordinance No. 74 (App. E1-E2).

4. Continental continued to pay its Denver use tax liabilities on its purchases for three full months after the enactment of the February Exemption, from February 1, 1991, until April 30, 1991 (App. A18). In oral argument before the district court, Continental was unable to explain why it continued to pay the use tax after the enactment of the February Exemption (App. K1-K2).

Denver discovered the cessation in Continental's payment of use taxes for the month of May, 1991 on June 20, 1991, when Continental filed its use tax return. At that time, Continental did not report certain use taxes, claiming to be exempt from payment under the provisions of the February Exemption (App. A18).

On August 9, 1991, City Council enacted (effective as of February 1, 1991) Ordinance No. 568, Series of 1991 (hereafter the "August Exemption" or "Ordinance No. 568"), retroactively repealing and clarifying the exemption formerly provided in Ordinance No. 75 (App. G1-G5). Continental concedes it is not exempt from taxation under the August Exemption prospectively from August 9, 1991.

5. The court of appeals held that Continental qualified for the February Exemption, but found that Continental was *not* entitled to a refund or credit of Denver use taxes paid from February 1, 1991 to April 30, 1991, due to Continental's procedural errors in applying for a refund (App. A23-A24). The refund and credit issue that was before the court of appeals is not a subject of this appeal. Therefore, the relevant time period in our case is May 1, 1991 (the date Continental ceased paying Denver use taxes), to August 8, 1991 (the day prior to the enactment date of the August Exemption).

6. The February Exemption, under which Continental claims its use tax exemption, exempts from use taxes sales of tangible personal property that are made to a transportation utility (such as an airline, busline, or railroad) so long as the personal property is used, stored, consumed, or distributed by the transportation utility at

the utility's facility (1) located in a Denver enterprise zone; (2) containing one million square feet of useable floor space; and (3) serving as headquarters or a regular place of reporting for duty for at least 2,000 employees of the transportation utility in the third year of operations and continually thereafter. Also, the transportation utility must comply with the last paragraph of the February Exemption which reads:

> This exemption may be applicable to the first and second years of operation at the facility *provided that the utility establishes a reserve account for the tax* for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

(App. F2; Emphasis added.)[3]

The court of appeals found that Continental satisfied the requirements of the February Exemption and that the retroactive and curative August Exemption would violate the retrospective restrictions of the Colorado Constitution (App. A23-A24). The court of appeals also construed the reserve account requirement, above, of the February Exemption, and found that the reserve account provisions did not apply to Continental, but applied only to *new* facilities (App. A14).

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[3] Continental admits: (a) that it did not have a single building in Denver that met the requirements of the February Exemption; (b) that it did not establish a reserve account for Denver taxes; and (c) that its multiple buildings at Stapleton were erected and in existence prior to the enactment of the February Exemption (App. C32; J1-J2).

The district court, on the other hand, held that Continental did *not* have a facility which would qualify for the February Exemption. *In Re Continental Airlines, Inc.*, 149 B.R., at 88; App. C29. The district court also found that Continental's failure to establish a reserve account for Denver use taxes also caused the February Exemption to not be applicable to Continental. 149 B.R., at 90; App. C33.

7. The preamble of the August Exemption states in part:

> WHEREAS, it was at the time of the introduction, passage, and enactment of Ordinance No. 75, Series of 1991, and is presently the intention of the Council that only a) uses of machinery, tools, and equipment in the operation of an equipment maintenance facility *at a single industry building meeting the square footage and employment requirements* and b) uses of building and construction materials for use in the construction of a maintenance facility for a single industrial building containing such minimum floor space and employing such number of employees be exempted from the use tax in conjunction with the construction and use of a *new, enclosed structure;* and
>
> WHEREAS, the Council, by enacting this bill into law expresses and reaffirms its understanding that *no facility, building, or enclosed structure or group of such facilities, buildings, or enclosed structures currently, as of the date of this enactment, and at all times prior thereto meets the eligibility criteria* established for the exemptions granted by Ordinance No. 75, Series of 1991, or by this ordinance, but that said Ordinance No. 75 was, and this ordinance is, intended to encourage a transportation utility to construct and operate

> such a maintenance facility in the City and County of Denver;. . . .

App. G2; emphasis added.

Denver has always contended that the clear intent of City Council in enacting the February Exemption was to provide an exemption only as a tax incentive to encourage the construction of a new transportation utility building with the attendant creation of new jobs in the Denver area.

The district court held in its review of the bankruptcy court's record that the legislative history, the August Exemption, and the reserve-account language in the February Exemption all dictate that the clear intent of the City Council in enacting the February Exemption was to attract a new transportation utility to Denver or to have a current utility expand into a new facility, consisting of a single structure. 149 B.R., at 88-90; App. C27-C29; C33.

8. Continental acknowledged before both the district court and the bankruptcy court that it did not qualify for the use tax exemption under the amended, clarifying provisions of the August Exemption. Continental, however, contended that it qualified for exemption under the provisions of the February Exemption and that the retroactive application of the August Exemption violated the Colorado Constitutional prohibition against the passage of retrospective laws. Colo. Const., Art. II, § 11, and Colo. Const. Art. XV, § 12; 149 B.R., at 79, 83; App. C6-C7; C17. Denver contended that Continental did not meet the exemption requirements of the February Exemption and that the August Exemption was valid retroactive law.

9. On appeal, the district court reversed the bankruptcy court, and held that Continental failed to qualify for the use tax exemption under the February Exemption and that Denver's first amended motion for payment should be granted. The district court listed the following reasons: (1) the use of the term "facility" in the February Exemption is ambiguous, and the clear intent of the City Council was to induce new or current transportation utilities to construct a new facility consisting of a substantial, single structure for Denver's economic growth; (2) "facility" must be construed in context and in accordance with clear legislative intent (new, substantial, single structure); (3) Continental could not include subleased space in calculating whether it met the square footage requirement of the February Exemption; and (4) Continental failed to comply with the applicable requirement in the February Exemption that it must pay the use taxes into a reserve account for a three-year period. 149 B.R., at 87-90; App. C24; C27; C29; C33.

The district court did not address the retroactive application of the August Exemption, but did look to the preamble of the August Exemption to confirm the legislative intent behind the February Exemption. *Id.*, at 88; App. C29.

The court of appeals disagreed with the district court and found that Continental met the requirements of the February Exemption, ignoring the legislative intent of City Council. App. A10. In addition, the court of appeals concluded that the August Exemption violated the

Colorado Constitution's prohibition of retrospective laws (App. A18).

STATEMENT OF STANDARD OF REVIEW – STATUTORY CONSTRUCTION IS A QUESTION OF LAW

This case centers on the construction of a Denver ordinance, and a municipal ordinance is to be treated as a statute for the purpose of reviewing a decision of the court of appeals holding the ordinance unconstitutional. *City of New Orleans v. Dukes*, 427 U.S. 297, 301 (1976). Statutory construction is clearly established as a question of law, and legal questions are subject to plenary review. *In re Sierra Steel Corporation*, 88 B.R. 314, 316 (D.C. Colo. 1987). *See also Sharon Steel Corp. v. National Gas Distrib. Corp.*, 872 F.2d 36, 43 (3d Cir. 1989); *Truck Drivers Local 807 v. Carey Transportation Inc.*, 816 F.2d 82, 88 (2d Cir. 1987).

Therefore, this Court sits in the same position as the lower courts, and is not bound by the lower courts' construction of the Denver Ordinances; *de novo* review is the applicable standard.

REASONS FOR GRANTING THE PETITION

I. COURT OF APPEALS MISCONSTRUED THE COLORADO CONSTITUTION.

The court of appeals erred in construing the Colorado Constitution, and in construing the case law thereunder,

by its holding that the August Exemption is unconstitutional retrospective legislation (App. A18). Legislation in Colorado is presumed constitutional, and the assailant thereof has the burden of proving its unconstitutionality beyond a reasonable doubt. *City of Leadville v. Rood*, 198 Colo. 328, 600 P.2d 62, 63 (1979).

Section 11 of Article II of the Colorado Constitution provides, as follows:

> No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

Section 12 of Article XV of the Colorado Constitution, reads in part, as follows:

> The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation. . . .

However, through judicial interpretation, the constitutional prohibition against laws retrospective in their application "have been engrafted with various exceptions whereby legislation operating retroactively is permitted notwithstanding seemingly clear and absolute prohibition against it." *Smith v. Putnam*, 250 F.Supp. 1017, 1018 (D.Colo. 1965).

A. A RETROACTIVE LAW IS VALID IF NOT "RETROSPECTIVE" IN OPERATION.

Continental conceded that an exception to the restrictions of the Colorado Constitution exists. A retroactive

law is constitutionally valid if it is not "retrospective" in operation. A law is retrospective if the statute impairs vested rights, creates a new obligation or duty, or attaches a new disability with respect to past transactions (also known as the "Story Definition" after Judge Story's often cited definition of retrospective laws). *Martin v. Board of Assessment Appeals*, 707 P.2d 348, 351 (Colo. 1985) (citing Judge Story from *Society for the Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756 (C.C.N.H. 1814)).

The Colorado Supreme Court has applied substantive amendments in a city's Safety Code to structures built prior to the Code's amendment, using the Story Definition of vested rights impairment and new disabilities. *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990). The court held that application of the amended Safety Code to existing buildings, constructed when a different safety code was in effect, did not constitute unconstitutional retrospective legislation. *Id.*, at 1271.

(i) *No vested rights in exemption.* The courts have held that statutes which provide for deductions or exemptions from taxation do not confer contract rights or other vested rights, and therefore, may be modified or repealed by the legislature. *People ex rel. Clyde v. Gilchrist*, 262 U.S. 94, 98-99 (1923). *Helvering v. U.S. Trust Company*, 111 F.2d 576, 578 (2d Cir. 1940), *cert. denied*, 45 U.S. 678 (1940); see also *Van Sickle v. Boyes, supra*, at 1271.

In Colorado, tax exemptions are considered a matter of grace and privilege, and not of right. *People v. Waterman's Estate*, 108 Colo. 263, 116 P.2d 204, 210 (1941); *Murray v. Board of Commissioners of Montrose County*, 28 Colo. 427, 65 P. 26, 27 (1901).

Thus, Continental does not have a vested right in the tax exemption formerly contained in the February Exemption.

(ii) *No new obligation, duty, or disability.* Continental did not specifically allege, nor did the court of appeals find, that Continental had a vested right in the February Exemption. Rather, Continental contended, and the court of appeals held, that the retroactive August Exemption created a new disability (payment of use tax) on past transactions, violating the Colorado Constitution's prohibition on retrospective legislation (App. A18).

The court of appeals, by this holding, misconstrued the Colorado Constitution, and the applicable case law.

(a) *Waiver of new disability argument by failure to set up reserve.* In construing the February Exemption, the district court held that the reserve requirements contained in the last paragraph of the February Exemption must be applied. According to the district court, the failure of Continental to establish the reserve account also caused Continental to not satisfy the statutory prerequisites of the February Exemption. 149 B.R., at 90; App. C33.

The reserve account requirement is contained in the last paragraph of the February Exemption and reads:

> This exemption may be applicable to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

Continental conceded that it did not establish a reserve account for use tax under the February Exemption (App. C32); 149 B.R., at 89. The court of appeals disagreed with the district court, finding that the reserve account only applied to a new facility and did not apply to Continental's existing buildings. (App. A14). The bankruptcy court did not address the reserve account in its opinion. The court of appeals and the bankruptcy court erred as a matter of law by failing to apply the reserve account requirements to Continental. See 149 B.R., at 89; App. C32.

Continental argued that, because its operations at Stapleton Airport were established more than three years prior to the enactment of the February Exemption, the reserve requirement of the February Exemption did not apply to it. However, this argument ignores the specific condition of establishing a reserve account imposed by the February Exemption. Even if the condition could be met by events occurring in the 1940's, when Continental began operations at Stapleton, the fact of the matter is that Continental did not satisfy the reserve requirement at any time.

The statutory intent behind the February Exemption was to create a tax incentive to entice new business. It would make no sense to attribute to City Council an intention to extend the exemption to existing structures. Courts are not to presume that a legislative body used language without meaning. *Blue River Defense Comm. v. Town of Silverthorne*, 33 Colo. App. 10, 516 P.2d 452, 454 (1973). Therefore, the reserve requirement should be strictly construed as being applicable to all transportation

utilities that attempt to utilize the February Exemption, regardless of how long they have been in operation.

The district court noted that "If the Court reads the reserve account requirement as Continental suggested (that it only applies to new operations) then that lends credence to the argument of Denver that the statute was only intended to encompass a new facility." 149 B.R., at 90; App. C33.

(b) *Payment of tax into reserve account was required, thus, no new disability.* Denver contends that no new disability, obligation, or duty (hereafter and collectively "disability") has been created by the retroactive application of the August Exemption, because any transportation utility that wanted to claim the February Exemption had to pay all use tax on exempt transactions into the reserve account, for its return to the City if the conditions for exemption were not satisfied for three years following the point at which the exemption is first claimed (App. C15; F2). 149 B.R., at 83. The district court properly found that the reserve requirement applied to Continental. 149 B.R., at 90; App. C33.

(c) *Application of retroactive tax law to same calendar year, creates no new disability.* In *Welch v. Henry*, 305 U.S. 134, 146-147 (1938), this Court upheld the retroactive application of a Wisconsin income tax statute, stating that "[t]axation is *neither a penalty* imposed on the taxpayer *nor a liability* which he assumes by contract. . . . Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe on due process. . . . " (Emphasis added). This Court also specifically noted that property taxes, like taxes on income, may be retroactively applied. *Id.*, at 147.

The Colorado Supreme Court adopted the analysis set forth in *Welch v. Henry* in determining that a Colorado property tax statute was constitutionally valid retroactive law, stating,

> The test of constitutionality set forth in *Welch* is to consider the nature of the tax and the circumstances in which it is laid. Under fifth amendment due process analysis, retroactive operation is constitutional where it is not harsh, arbitrary or unfair.
>
> While we must enforce a more specific prohibition than that found in the Due Process Clause, we agree with the analysis set forth in *Welch*. . . .

Martin v. Board of Assessment Appeals, supra, 707 P.2d, at 354 (citing *Welch, supra,* 146-147).

The Colorado court then upheld the retroactive change in a Colorado property tax statute, after determining that taxpayers had no vested right in the factors used to determine the value of assessed property. *Id.*, at 354.

The court of appeals erred in rejecting *Martin,* stating that the *Martin* case addressed only a retroactive change in assessment factors and not a discrete transaction. The court of appeals failed to examine the detailed analysis that the *Martin* court performed in examining all types of retrospective tax legislation (App. A17-A18). *Martin,* at 352-354. The Colorado Supreme Court's analysis in *Martin* is particularly insightful on how the Colorado Supreme Court would likely analyze and construe the August Exemption. *Ibid.* See also *City of Aurora, Colorado. v. Bechtel Corp.,* 599 F.2d 382, 386 (10th Cir. 1979) (a federal court of appeals must attempt to construe a Colorado statute in the manner in which the Supreme Court of Colorado would interpret the statute; in doing so a federal court may look to *all resources, including decisions of*

other states, as well as Colorado and federal decisions) (emphasis added).

The court in *Martin* instructs us that the majority of states which have tested tax provisions which apply prior to their date of enactment against specific state constitutional prohibitions similar to Colorado's have held tax amendments may impose changes retroactively effective during the year of enactment. *Id.*, at 352 (citing *Hanson v. Town of Flower Mound,* 539 S.W.2d 178 (Tex. Civ. App. 1976); *Estate of Kennett v. State,* 115 N.H. 50, 333 A.2d 452, 455 (1975)); see *Roberts v. Gunter,* 251 Ga. 276, 304 S.E.2d 369, 376 (Ga. 1983).

In the case of *Hanson v. Town of Flower Mound, supra,* the Texas court held that a municipal tax enacted on November 23, 1974, may lawfully be levied against property located within the City as of January 1, 1974, without violating the Texas State constitutional prohibition against retrospective legislation. The Texas Constitution provides: "No bill of attainer, ex post facto law, *retroactive law,* or any law impairing the obligation of contracts, shall be made." Tex. Const., Art. I, § 16. The Texas court also laid out the dispositive case law: "Laws authorizing taxes are not retrospective so far as the year in which they are authorized is concerned." *Id.*, at 179.

The New Hampshire Supreme Court, using the vested rights impairment and new disability test, has held that a tax provision passed in April of 1970 and taxing business profits retroactively to January 1, 1970, did not violate the specific constitutional prohibition against retrospective legislation. *Estate of Kennett v. State, supra,* 333 A.2d, at 455 (citing N.H. Const., Pt. I, Art. 23). See also, *Roberts v. Gunter, supra,* 303 S.E.2d, at 376 (in construing constitutional prohibition (Ga. Const., Art. I,

§ I, ¶ VII) that "no . . . retroactive law . . . shall be passed," held: that a bank share tax statute passed in March 1975 lawfully applied retroactively to January 1, 1975).

(d) *The withdrawal of a privilege (i.e., the exemption from the tax) does not create a disability.* As discussed above, tax exemptions in Colorado are clearly a matter of grace and privilege. *Waterman's Estate, supra,* 116 P.2d, at 210; *Murray, supra,* 65 P., at 27; *State of Colorado v. Fisch's Estate, supra,* 387 P.2d, at 285. Also, this Court has held that taxation is neither a penalty imposed on the taxpayer nor a contractual liability. *Welch v. Henry, supra,* 305 U.S., at 146 (1938). It, thus, logically follows that the retroactive withdrawal of privilege does not create a new disability.

B. IN THE ALTERNATIVE, THE AUGUST EXEMPTION IS A CONSTITUTIONALLY VALID RETROACTIVE CLARIFICATION.

Continental conceded that in addition to the exception created under the Judge Story Definition (vested rights impairment, new disability test), a second exception exists to the constitutional prohibition on retrospective laws: a retroactive application of a statute is permissible under the constitutional prohibition against retrospective laws where a change is curative or procedural in nature. *In re Colorado Mercantile Co.,* 299 F.Supp. 55, 57 (D.Colo. 1969); *Smith v. Putnam,* 250 F.Supp. 1017, 1018 (D.Colo. 1965). Furthermore, the Tenth Circuit has established that not every change in phraseology indicates a desired change in substance. An amendment may be made for the purpose of expressing more clearly and accurately the same intent. *Oklahoma Tax Commission v. Standolind Pipe Line Co.,* 113 F.2d 853, 856 (10th Cir.

1940), *cert. denied,* 311 U.S. 616 (1940). An amendment to a statute to eliminate ambiguity is a valid retroactive "curative statute". *Washington Waste Systems, Inc. v. Clark County,* 115 Wash.2d 74, 794 P.2d 508, 511 (1990).

In addition the Tenth Circuit has recognized

> it is a general rule of construction that by amending a statute the legislature intended to make a substantial change in the preexisting law, but like others, *that rule has its exceptions.* It is *not every change in phraseology that indicates a desired change in substance and effect.* It may be made for the purpose of expressing more clearly and accurately the same intent or to improve diction. Or it may be to meet a new and unanticipated condition brought about by judicial interpretation of the preexisting law.

Oklahoma Tax Commission v. Stanolind Pipe Line Co., 113 F.2d 853, 856 (10th Cir. 1940), *cert. denied,* 311 U.S. 616 (1940) (emphasis added). In *Stanolind Pipe,* the court accepted as the declared intent of the legislature, when it enacted the original tax code, an amendment that retroactively construed and clarified the code. *Ibid.*

Also, a line of cases holds that when a tax statute is amended at a time when taxpayers are resisting taxation under a statute, the inference arises that the amendment was intended as a clarification rather than a substantive change of preexisting law. *International Business Machines v. State Board,* 26 Cal.3d 923, 609 P.2d 1, 9 (1980) (retroactively applying an amendment to sales tax exemption contained in state statute) (citing *City of Los Angeles v. Rancho Holmes, Inc.,* 40 Cal.2d 764, 256 P.2d 305 (1953); *Bermite Powder Company v. Franchise Tax Board,* 109 Cal.App.2d 524, 242 P.2d 9 (1952)). *See also BQP Industries v. State Bd. of Equalization,* 694 P.2d 337, 345 (Colo.App.

1984) (a subsequent legislative-pronouncement statute clarifying the intent of a prior statute is entitled to great weight in construing the prior statute).

Therefore, even if the provisions of the August Exemption are considered as constitutionally invalid retroactive law, the August Exemption may be read as a constitutionally valid clarification, and that should be controlling in interpreting the February Exemption as to legislative intent (or be afforded "great weight" in interpreting the February Exemption). *BQP, supra,* at 345. As discussed above, the provisions of the August Exemption and its preamble should be dispositive: "facility" in the February Exemption means a new, single building that meets the square footage and employment requirements (App. C28-C29). 149 B.R., at 88.

II. THE COURT OF APPEALS SUPPORTED ITS DECISION BY AN ERRONEOUS USE OF THE RULES OF STATUTORY CONSTRUCTION IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND THE COLORADO COURTS.

A. STRICT CONSTRUCTION AGAINST EXEMPTIONS REQUIRED.

Continental concedes, and the court of appeals correctly found, that the maxim that a tax statute is to be interpreted liberally in favor of a taxpayer has no applicability in construing a tax exemption statute; tax exemptions are to be strictly construed in favor of government and against granting the exemption (App. A10). The taxpayer has the burden to prove it is entitled to the exemption by clear and convincing evidence. *Atlantic Coast Line Railroad Company v. Phillips,* 332 U.S. 168, 172 (1947); *State*

of Colorado v. Fisch's Estate, supra, 387 P.2d, at 285. A legislature is not presumed to have relinquished its power of taxation beyond the narrowest rational reading of a tax exemption. The potential need of all governmental powers and fairness in the distribution of burdens or enjoyment of privileges preclude a broad reading. *Atlantic Coast Line,* 332 U.S., at 173.

The court of appeals and the bankruptcy court agreed that strict construction against Continental was the standard, although both courts failed to apply this standard. 138 B.R. at 435; App. A10, D11. The court of appeals found that a facility of a transportation utility, such as an airline, may consist of one building or may consist of multiple buildings (App. A11-A12). Strict construction against granting the exemption requires that the "one building" definition prevail, under which Continental fails to satisfy a condition for the exemption. *Fisch's Estate, supra,* 387 P.2d, at 282.

B. THE PLAIN-MEANING DOCTRINE IS SUBSERVIENT TO A DISCERNIBLE LEGISLATIVE PURPOSE.

The court of appeals' decision to disregard legislative intent is in direct conflict with the decisions of this Court, with its own decisions, with other courts of appeals, and with Colorado courts.[4] See *United States v. American*

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[4] The court of appeals and the bankruptcy court erroneously disregarded the legislative intent of the Denver City Council, holding that legislative intent is only relevant to the extent that the language of the Ordinance is unclear or ambiguous (App. A11-12, D18). The district court stated "The

Trucking Ass'n, 310 U.S. 534, 546-549 (1940) (when the plain meaning produces results at variance with legislative purpose the court will follow the purpose rather than the literal words); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989) (where the literal application of a statute will produce results at odds with legislative intent, the intent of the drafters, rather than the plain language, controls); *In re Channel Home Centers, Inc.*, 989 F.2d 682, 687 (3d Cir. 1993) (even unambiguous statutory language need not be followed when a literal interpretation will produce results at odds with the intention of its drafters); *United States v. Alvarez-Sanchez*, 975 F.2d 1396, 1400 (9th Cir. 1992); *Lewis v. Grinker*, 965 F.2d 1206, 1215 (2d Cir. 1992). For Colorado decisions, *see People ex rel. Dunbar v. Trinidad State Jr. Col.*, 184 Colo. 305, 520 P.2d 736, 738 (1974) ("Any construction which is inconsistent with the general purposes of a statute must be rejected in favor of that construction which furthers the legislative intent."); *People v. Meyers*, 182 Colo. 263, 510 P.2d 430, 432 (1973) (a statutory exemption may not be construed in a way as to defeat obvious legislative intent).

As set forth in the above line of cases this recognized rule, that legislative intent controls over literal interpretation, was again confirmed by the Colorado Court of Appeals in the case of *Walgreen Company v. Charnes*, 859

Bankruptcy Court interpreted the *City of Littleton* [*v. County Com'rs*], 787 P.2d 158[, 161 (Colo. 1990)] as standing for the proposition that only in cases where the statute is found to be ambiguous should a Court turn to legislative intent for statutory construction purposes. Clearly, however, under Colorado law, the controlling principle is that the Court is instructed to uphold the legislative intent in enacting a statute." (App. C24, n. 2). 149 B.R., at 86, n. 2.

P.2d 235, 240-41 (Colo.App. 1993), *cert. denied* (Sept. 27, 1993). In construing Denver ordinances the intermediate Colorado court stated,

> Our primary task in construing a statute (or ordinance) is to determine and give effect to the intent of the body enacting it. *Jones v. Cox*, 828 P.2d 218 (Colo. 1992).
>
> Here the stated intent of the City [of Denver] is that 'every person who stores, uses, distributes or consumes . . . tangible personal property purchased at retail' be subject to the use tax. Denver Revised Municipal Code § 53-92(a).
>
> * * *
>
> Statutes (or ordinances) must be construed as a whole and in a way as not to defeat obvious legislative intent. [*Id.*, at 240-241]

The court of appeals misinterpreted Colorado case law, and failed to apply its own precedent and the decisions of this Court by its finding that "[w]hen the language of a statute is clear and unambiguous, there is no need to inquire into the legislative purpose concerning a particular statutory provision beyond applying the language as written." (App. A11, citing *Kane v. Town of Estes Park*, 786 P.2d 412, 415 (Colo. 1990); *Triad Painting Co. v. Blair*, 812 P.2d 638, 644 (Colo. 1991); and *American Respiratory Care Servs. v. Manager of Revenue*, 835 P.2d 623, 625 (Colo. App. 1992). If, in fact, the term "facility" were not ambiguous, the district court and the court of appeals would not differ in their conclusions, and the parties would not be before this Court.

However, even assuming that the term is not ambiguous, the court of appeals erred, for in *Kane, supra*, the

court states: "In interpreting statutes our *primary task is to determine and give effect to the legislature's intent.*" *Id.*, 786 P.2d at 415 (emphasis supplied). See also, *Triad, supra*, 812 P.2d, at 644 ("In interpreting a statute we seek to determine the *intent of the legislature. . . .* ", citing *Kane v. Town of Estes Park, supra*, 786 P.2d, at 415) (emphasis added) and *American Respiratory Care, supra*, 835 P.2d, at 625 ("Interpretation or construction of a statute is a question of law and the primary objective is to ascertain the intent of the General assembly. . . .). Thus, the legislative intent must be the key focus even if the term "facility" has only the common meaning of that given it by the court of appeals.

In the case at bar, the legislative intent and purpose are unquestionably set forth in the August Exemption, in the legislative history, and in reading the February Exemptions in pari materia. The legislative purpose must be followed regardless of the ambiguity of the February Exemption.

As suggested above, before the plain-meaning doctrine can be applied to a statute, and "[b]efore it can be said that no ambiguity exists, it must he concluded that the questioned words or language are capable of [only] one interpretation"; the language must be "so clear that it can only be read one way." *Landtech Corp. v. State Mutual Life Ass'n. Co.*, 605 F.2d 75, 80 (3d Cir. 1979). See also *Black's Law Dictionary*, 5th Ed., at 1366, which defines "unambiguous" as "susceptible of but one meaning".

The February Exemption used the term "facility" in the context of a transportation utility. The court of appeals misapprehended "unambiguous" by its holding that "facility" in the February Exemption is unambiguous, then finding that a transportation facility is

capable of more than one meaning: "A transportation 'facility' can consist of *one building or several buildings* used in conjunction to transport cargo or passengers." App. A11-A12; emphasis added.

Any ambiguity in the February Exemption must be construed in favor of Denver and against the exemption. *State of Colorado v. Fisch's Estate, supra,* 387 P.2d, at 285 ("[I]n Colorado . . . *exemptions* are a matter of grace and a claimed exclusion *will not be granted* unless given by the Constitution or *unless the statute is clear and unambiguous.*") (emphasis added); *Security Life and Accident Co. v. Heckers,* 177 Colo. 455, 495 P.2d 225, 226 (1972) (burden is on the taxpayer who claims an exemption to clearly establish the right to such exemption).

C. THE COMMON-USAGE-OF-WORDS RULE IS SUBSERVIENT TO LEGISLATIVE PURPOSE; MOREOVER, THE COMMON USAGE OF THE TERM AIRPORT "FACILITY" IS A SINGLE BUILDING.

The court of appeals' decision is also contrary to that court's own precedent, to the decisions of this Court, and to the decisions of the Colorado courts, in that the court of appeals fails to apply the dispositive rule that the common usage of words must also be subservient to apparent legislative purpose. *United States v. American Trucking Ass'n, supra,* 310 U.S., at 546-549; *People ex rel. Dunbar, supra,* 520 P.2d, at 738 ("We need not concern ourselves with what the term ordinarily means, but rather, with what it means in the context of the statute."). Even if a word in a statute has a generally accepted common-law meaning, the courts will not impose that meaning if there are grounds for inferring an affirmative

instruction from the legislature to define it otherwise. *United States v. Everett*, 700 F.2d 900, 904 (3d Cir. 1983).

(i) Interpretation of Facility by Colorado Court. The court of appeals also erred as a matter of law by failing to apply the Colorado Court of Appeals' interpretation of "facility" when construing the February Exemption. The granting of this Petition by the Court is necessary to secure and maintain uniformity with Colorado case law. *See, City of Aurora, Colorado, supra*, 599 F.2d at 386 (a federal court of appeals must attempt to construe a Colorado statute in the same manner in which the Supreme Court of Colorado would construe it). In the Colorado case of *Longbottom v. State Bd. of Comm. Colleges and Occupational Ed.*, ___ P.2d ___, No. 92CA0410 (Colo. App. May 20, 1993), *petition for cert. filed*, No. 93SC467 (July 26, 1993), the court equated the word "facility" with the words "building" and "public building". *Id.*, at ___; slip op., at 6-7. The Colorado court looked to the definition of "facility" in *Webster's Third New International Dictionary*, unabridged, at 812 (1976), and, after discussing the plain-meaning rule, the court stated, "Our primary task in construing a statute is to give effect to the intent of the General Assembly". *Ibid.*

The analysis by the court of appeals is further flawed in that the court cited no authority other than general dictionary definitions when it interpreted "facility" (App. A11-A12).

(ii) Must Construe in Context. The district court observed that the common usage of a word must be interpreted in "context", which in this case is in relation to a transportation utility. Den. Mun. Rev. Code § 1-3; 149 B.R., at 86; App. C24. Also, this Court has repeatedly warned against the dangers of an approach to statutory construction which

confines itself to the bare words of a statute, for "literalness may strangle a meaning." *Lynch v. Overholser*, 369 U.S. 705, 709 (1962).

Numerous cases, United States Treasury Regulations, Federal Aviation Statutes, and Colorado statutes that use "facility" in the context of an *airport facility*, connote the use of the term "facility" as a single building (or space within a building). 149 B.R., at 86; App. C24 (citing Treas. Reg. § 1.103-8(e)(2)).

(iii) Continental's Interpretation. Continental itself refers to its buildings at Stapleton Airport *as "facilities"*. In its Plan for Reorganization, as filed with the bankruptcy court, Continental states:

> CAL intends to construct a major *new maintenance facility* before 1995. The *new facility* is necessary in part to replace *CAL's facilities at Denver*, which are scheduled to close in early 1994.

(App. L3; emphasis added.) 149 B.R., at 86; App. C25.

(iv) Legislative History. After finding the term "facility" ambiguous, the district court reviewed the legislative history to determine the intent, which establishes the central purpose of the February Exemption. It was to attract new construction of a new facility by a transportation utility. The February Exemption was enacted, in part, in response to a proposal by United Airlines to build an airline maintenance facility in Denver that would consist of a single, 1,500,000 square foot structure to which 2,000 or more employees would regularly report (App. C26-C27). 149 B.R., at 87.

(v) In Pari Materia. Further, Ordinance No. 74, Series of 1991 (exemption from occupational privilege tax), enacted concurrently and *in pari materia* with the February

Exemption, uses the word "facility" interchangeably with the word "structure" (App. E1-E2).

(vi) Legislative Declaration in August Exemption. The August Exemption clarifies that Continental does not qualify under the February Exemption. In the August Exemption, the City Council specifically declared its intent in enacting the February Exemption. The preamble language of the August Exemption states in part:

> WHEREAS, it was at the time of the introduction, passage, and enactment of Ordinance No. 75, Series of 1991, and is presently the intention of the Council that only a) uses of machinery, tools, and equipment in the operation of an equipment maintenance facility *at a single industrial building meeting the square footage and employment requirements* and b) uses of building and construction materials for use in the construction of a maintenance facility . . . be exempted from the use tax in conjunction with the construction and use of a *new, enclosed structure;* and
>
> . . . said Ordinance No. 75 was, and this ordinance is, *intended to encourage a transportation utility to construct and operate* such a maintenance facility in the City and County of Denver;. . . .

App. G1-G2; emphasis added. See also 149 B.R., at 88; App. C27-C28.

Thus, the intent of City Council in enacting the February Exemption was to provide an exemption only to a facility consisting of a new, single building. Continental failed to meet these qualifications.

The district court held that "the August 1991 enactments and discussion of intent are relevant and entitled to weight in determining the Denver City Council's intent in passing Ordinance No. 75." 149 B.R, at 88; App. C27-C28.

See BQP Industries, supra, 694 P.2d, at 345 (subsequent declaration of intent by legislature is entitled to great weight in the statutory construction of prior statute); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667, n. 8 (1980) (arguments predicated on subsequent legislative actions "should not be rejected out of hand as a source that a court may consider in the search for legislative intent.") The court of appeals erred in finding the August Exemption and its preamble language as "not relevant" (App. A11-A12); see also 149 B.R., at 88; App. C27-C28.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 1994

No. _____

In The

Supreme Court of the United States

October Term, 1993

In re: CONTINENTAL AIRLINES, INC., *et al.*,

Debtors.

PATRICIA BEER, MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER, COLORADO,

Petitioner,

v.

CONTINENTAL AIRLINES, INC., *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7088

IN RE: CONTINENTAL AIRLINES; CONTINENTAL AIRLINES HOLDINGS, INC.; CHELSEA CATERING CORPORATION; CML HOLDINGS, INC.; TAC 301 CORPORATION; TAC 302 CORPORATION; TAC 303 CORPORATION; TAC 304 CORPORATION; TAC 306 CORPORATION; TAC 307 CORPORATION; TAC 309 CORPORATION; TAC 312 CORPORATION; TAC 313 CORPORATION; TAC 314 CORPORATION; TAC 315 CORPORATION; TAC 318 CORPORATION; TAC 319 CORPORATION; TAC 320 CORPORATION; TAC 321 CORPORATION; TAC 322 CORPORATION; TAC 325 CORPORATION; TAC 326 CORPORATION; TAC 327 CORPORATION; TAC 328 CORPORATION; TAC 329 CORPORATION; TAC 330 CORPORATION; TAC 331 CORPORATION; TAC 332 CORPORATION; TAC 333 CORPORATION; TAC 334 CORPORATION; TAC 376 CORPORATION; TAC 401 CORPORATION; TAC 402 CORPORATION; TAC 811 CORPORATION; TAC 818 CORPORATION; TAC 819 CORPORATION; TAC 820 CORPORATION; TAC 823 CORPORATION; TAC 833-834 CORPORATION; TAC 835 CORPORATION; TAC FUEL MANAGEMENT, INC.; TEXAS AIR LEASING CORPORATION; BRITT AIRWAYS, INC.; ROCKY MOUNTAIN AIRWAYS, INC., CONTINENTAL AIRLINES HISTORICAL SOCIETY, INC.; CONTINENTAL AIR MANAGEMENT SERVICES, INC.; CONTINENTAL-TRUK HOTEL CORPORATION; FRONTIER AIRLINES, INC.; NEW YORK AIRLINES,

INC.; SYSTEM ONE HOLDINGS, INC.; SYSTEM ONE TRAVEL RESOURCES, INC.; SYSTEM ONE DIRECT ACCESS, INC.; MAXPIU INTERNATIONAL, INC.,

Debtors.

PATRICIA BEER, MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER, COLORADO,

v.

CONTINENTAL AIRLINES; CONTINENTAL AIRLINES HOLDINGS, INC.; CHELSEA CATERING CORPORATION; CML HOLDINGS, INC.; TAC 301 CORPORATION; TAC 302 CORPORATION; TAC 303 CORPORATION; TAC 304 CORPORATION; TAC 306 CORPORATION; TAC 309 CORPORATION; TAC 309 CORPORATION; TAC 312 CORPORATION; TAC 313 CORPORATION; TAC 314 CORPORATION; TAC 315 CORPORATION; TAC 318 CORPORATION; TAC 319 CORPORATION; TAC 320 CORPORATION; TAC 321 CORPORATION; TAC 322 CORPORATION; TAC 325 CORPORATION; TAC 326 CORPORATION; TAC 327 CORPORATION; TAC 328 CORPORATION; TAC 329 CORPORATION; TAC 330 CORPORATION; TAC 332 CORPORATION; TAC 333 CORPORATION; TAC 334 CORPORATION; TAC 376 CORPORATION; TAC 401 CORPORATION; TAC 402 CORPORATION; TAC 811 CORPORATION; TAC 818 CORPORATION; TAC 819 CORPORATION; TAC 820 CORPORATION; TAC 823 CORPORATION; TAC 833-834 CORPORATION; TAC 835 CORPORATION; TAC FUEL MANAGEMENT, INC.; TEXAS AIR LEASING CORPORATION; BRITT AIRWAYS, INC.; ROCKY MOUNTAIN AIRWAYS, INC.; CONTINENTAL AIRLINES HISTORICAL SOCIETY, INC.; CONTINENTAL AIR MANAGEMENT SERVICES, INC.; CONTINENTAL-TRUK HOTEL CORPORATION; FRONTIER AIRLINES, INC.; NEW YORK AIRLINES,

INC.; SYSTEM ONE HOLDINGS, INC.; SYSTEM ONE TRAVEL RESOURCES, INC.; SYSTEM ONE DIRECT ACCESS, INC.; MAXPIU INTERNATIONAL, INC.

THOMAS E. ROSS,

Trustee

Continental Airlines, Inc.,

Appellant

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 92-00244)
District Judge: Hon. Joseph J. Farnan, Jr.

Argued August 13, 1993

BEFORE: Scirica, Cowen and Seitz
Circuit Judges

(Filed SEP 20, 1993)

OPINION OF THE COURT

COWEN, *Circuit Judge.*

This case presents issues of statutory construction of a municipal use tax exemption ordinance. For the relevant time period, February 1 through August 8, 1991, Continental Airlines, Inc. ("Continental") was involved in bankruptcy proceedings in the district of Delaware. The City and County of Denver, Colorado (jointly "Denver") initiated this litigation by filing a motion with the bankruptcy trustee for payment of an administrative assessment of use taxes owed by Continental for the period May 1 through August 8, 1991 (the "assessment period").

Continental answered that it was not liable for payment of use tax because it qualified for an exemption. Continental cross-moved the bankruptcy court to order Denver to refund or credit use tax paid for the period February 1 through April 30, 1991 (the "refund period"). Denver maintains that Continental is liable for use tax on all purchases made during both the assessment period and the refund period (jointly the "entire period" or "disputed time period").

I.

The dispute between the parties as to whether Continental is liable for payment of the use tax arises from Continental's operations at Stapleton International Airport in Denver ("Stapleton"). Continental operates an airline hub at Stapleton for which it leases more than one million square feet and employs greater than six thousand people. The leased area encompasses buildings used for airplane maintenance and storage, terminal concourses and ticket counters, office space, and food production. Some of the building space was vacant during the disputed time period. Continental also leases parking areas at Stapleton.

Denver imposes a use tax on all personal property purchased out-of-state for in-state use. Den.Rev.Mun.C. § 53-96. This use tax applies to commercial airlines like Continental which purchase supplies including aviation fuel, airplane and vehicle parts, food, and tools from out-of-state vendors. The procedure for paying the Denver use tax differs from that of sales taxes, in which the seller collects the tax from the purchaser and remits the balance

to the taxing entity. Denver requires all vendees subject to use tax to file a use tax return on the twentieth day of the month covering all transactions from the previous month. Den.Rev.Mun.C. § 53-98(i). Payment of use tax is due concurrently with this filing.

In early 1991, the Denver City Council enacted an ordinance providing an exclusion to the use tax for purchasers who met certain criteria. Ordinance 75 exempted from use taxation purchases of personal property by a "transportation utility" for use, consumption, storage, or distribution at a "facility (a) located within an enterprise zone . . . (b) that contains at least one million (1,000,000) square feet of useable floor space and (c) that serves as a . . . regular place of reporting for duty for at least two thousand (2,000) employees." Denver, Colo. Ordinance 75, § 2, Series of 1991, effective February 1, 1991, Den.Rev.Mun.C. § 53-97(17) (repealed) ("February exemption" or "Ordinance 75"). In addition, Ordinance 75 required taxpayers claiming a use tax exemption to pay the normal tax amount into a reserve account for the first two years of operation at the facility. *Id.* The purpose of this reserve arrangement was to revoke the February exemption in the event total employment at the transportation utility dropped below two thousand employees during the third year of operations.

For the months of February, March, and April, 1991, Continental timely filed its use tax return on or about the 20th day following the end of the month and enclosed payment with its filing. Beginning with its June 20, 1991 filing, which covered transactions for the month of May, 1991, Continental claimed an exemption from the use tax under Ordinance 75. For months in which Ordinance 75

was in effect but Continental had paid its use tax, the refund period, Continental claimed a refund and credit with later filings. Specifically, Continental filed a refund claim for the months of March and April, 1991 on July 19, 1991. Furthermore, Continental filed amended use tax returns on July 19, September 4, and September 27, 1991 for the months of February, March, and April respectively, for the purpose of requesting a tax credit in the event its refund claims were rejected.

On August 5, 1991, the Denver City Council repealed Ordinance 75 and replaced it with an exemption ordinance further clarifying some eligibility requirements and adding additional requirements. Denver, Colo. Ordinance 568, §§ 1-4, Series of 1991, effective August 9, 1991, Den.Rev.Mun.C. § 53-97(16) & (17) (revised) ("August amendment" or "Ordinance 568"). Because the parties have stipulated that Continental is not exempt from use tax liability under the terms of Ordinance 568, this dispute encompasses only the time period from February 1 through August 8, 1991.

Denver proceeded to demand payment of use tax from Continental for the period from May 1 through August 8, 1991. Following the issuance of an assessment against Continental for unpaid use taxes for the months of May and June, 1991, on August 16, 1991 Denver filed a motion for payment of administrative expenses in the bankruptcy court pursuant to 11 U.S.C. § 503(a), (b)(1)(B)(i), and (b)(1)(C). Denver amended its motion on October 8, 1991 to request payment of additional use tax assessments, interest, and penalties for the period covering July 1 through August 8, 1991. Continental challenged all assessments by filing a written petition for a "revision,

modification, or cancellation" with the appropriate revenue official within twenty days of receipt. *See* Den.Rev.Mun.C. § 53-117(c). Continental also cross-moved the bankruptcy court to order Denver to refund or credit use tax paid during the refund period.

II.

This dispute between Continental and Denver presents three basic issues: (1) whether Continental met all the requirements of Ordinance 75 so as to be exempt from the use tax; (2) whether Ordinance 568, which expressed the Denver City Council's intent to repeal Ordinance retrospectively, is constitutional as applied to Continental in this dispute; and (3) whether Continental complied with all necessary procedures in order to claim a refund for use taxes paid, and to challenge assessments made by Denver.

III.

In addressing the first question, the bankruptcy court found that Continental met all the requirements of Ordinance 75 so as to be exempt from use tax for the period from February 1 through August 8, 1991. *In re Continental Airlines, Inc.*, 138 B.R. 430, 435-37 (Bankr. D. Del. 1992), *rev'd*, 149 B.R. 76 (D. Del. 1993). The bankruptcy court also concluded that the retrospective operation of Ordinance 568 to prevent Continental from claiming use tax exemption under Ordinance 75 violated provisions of the Colorado Constitution. *Id.* at 437-38. As to procedural defaults alleged by Denver, the bankruptcy court found that the sixty day refund application period should run

from the time of use tax payment, not from the date of purchase. *Id.* at 438. Thus, the refund application for April, which was filed on July 19, 1991, was timely according to the bankruptcy court. Although the refund applications for February and March were not filed within sixty days of payment, the bankruptcy court ruled that Continental should receive a use tax credit for those months. *Id.*

The district court disagreed with the bankruptcy court as to whether Continental was exempt from the use tax under the requirements of Ordinance 75. *In re Continental Airlines, Inc.*, 149 B.R. 76, 85-90 (D. Del. 1993). In addition, the district court found that Continental was procedurally barred from receiving a use tax refund or credit for the refund period because it did not file an application within sixty days of purchase, nor did it attach original invoices. *Id.* at 89. Since Continental did not qualify for use tax exemption under the terms of Ordinance 75, the district court did not consider whether Ordinance 568 unconstitutionally operated retrospectively.

IV.

Continental appeals the order of the district court which determined that it is subject to Denver use tax for the entire period from February 1 through August 8, 1991. We have appellate jurisdiction pursuant to 28 U.S.C. § 158(d). This appeal presents issues of statutory construction that are questions of law subject to plenary review. *Sharon Steel Corp. v. National Fuel Gas Distribution Corp.*, 872 F.2d 36, 38-39 (3d Cir. 1989); *Resyn Corp. v.*

United States, 851 F.2d 660, 664 (3d Cir. 1988). The legal determinations of both the district court and the bankruptcy court "receive no presumption of correctness." *Resyn*, 851 F.2d at 664. When reviewing factual determinations made by the bankruptcy court, the trial court of initial jurisdiction, we employ the "clearly erroneous" standard. *Id.*; *Sharon Steel*, 872 F.2d at 38.

V.

We first address the issues concerning whether Continental met the substantive criteria of Ordinance 75 so that it is exempt from use tax for the period from February 1 through August 8, 1991.[1] Ordinance 75 contains three primary criteria for a transportation utility to meet in order to be exempt from use taxation. The first prerequisite, that the use or distribution facility be "located within an enterprise zone," Den.Rev.Mun.C. § 53-97(17)(a), is not at issue as the parties have stipulated that Stapleton falls within such a zone. The third requirement, that the facility "serve[] as a . . . regular place of reporting for duty for at least two thousand (2,000) employees[,]" *id.* § 53-97(17)(c), likewise is not disputed. Denver concedes that at least six thousand Continental employees regularly report to work at Stapleton.

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[1] Applying the substantive criteria of Ordinance 75 as interpreted by this Court to the present facts does not end our inquiry because Continental may have forfeited its right to challenge a use tax assessment or to apply for a use tax refund by not complying with the requisite procedures.

The primary dispute between the parties centers first on whether Continental's occupation of multiple leased buildings at Stapleton constitutes a "facility" in the context of a "transportation utility" within the meaning of Ordinance 75. Second, even if Continental's operations are interpreted to be a facility, Denver maintains that the total area occupied and used by Continental at Stapleton does not amount to one million square feet. Denver also contends that Continental's failure to pay its use tax obligation into a reserve account, *see id.* § 53-97(17), disqualifies it from receiving an exemption. We address each issue in order.

A. Does "Facility" Refer Only To One Building?

Continental argues that the term "facility" as used in Ordinance 75 is not ambiguous and that the ordinary meaning of the term encompasses operations undertaken in multiple buildings for a common purpose. Denver responds that we should ignore the plain meaning of the term "facility" to exclude Continental's Stapleton operations from use tax exemption under Ordinance 75 because the legislative intent was to provide an exemption only for newly built facilities consisting of a single building. We conclude that the term "facility" as used in the February exemption is not ambiguous and that we need not look beyond its plain meaning to determine that Continental's Stapleton operation is a facility for purposes of applying Ordinance 75.

In Colorado, statutes granting tax exemptions are narrowly construed against the taxpayer. *American Respiratory Care Servs. v. Manager of Revenue*, 835 P.2d 623, 625

(Colo. App. 1992). Despite this presumption against the taxpayer, the normal rules of statutory construction still apply. When the language of a statute is clear and unambiguous, there is no need to inquire into the legislative purpose concerning a particular statutory provision beyond applying the language as written. *Kane v. Town of Estes Park*, 786 P.2d 412, 415 (Colo. 1990) (en banc); *Triad Painting Co. v. Blair*, 812 P.2d 638, 644 (Colo. 1991) (en banc). These rules apply with equal force in the construction and interpretation of municipal ordinances. *American Respiratory Care*, 835 P.2d at 625 (citing 1A Norman J. Singer, *Sutherland Statutory Construction* § 30.06 (4th ed. 1985)). "When an ordinance is facially unambiguous, its plain meaning should not be altered by judicial construction." *Catholic Archdiocese of Denver v. City and County of Denver*, 741 P.2d 333, 337 (Colo. 1987) (en banc).

The Denver City Council has not provided a definition for "facility" within Ordinance 75 or any related ordinance adopted at that time. Without a statutory definition, a term should be given its ordinary meaning. A "facility" is something that is built or installed to perform a particular function. Black's Law Dictionary 591 (6th ed. 1990); *accord* Webster's II New Riverside University Dictionary 460 (1984). When considered in the context of a "transportation utility," the subject of Ordinance 75, we find the meaning of the term "facility" to be unambiguous.[2] A transportation "facility" can consist of one

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[2] By finding the term "facility" unambiguous as used in section two of Ordinance 75, we need not address the argument that the Denver City Council intended section two to be read *in pari materia* with section one, where it specifically limited the

building or several buildings used in conjunction to transport cargo or passengers. Having determined that the use of the term "facility" in Ordinance 75 is clear on its face, we must apply this definition in a straight forward fashion, rather than looking for legislative intent outside the statute language. Continental's Stapleton airline hub is a facility within the plain meaning of Ordinance 75.

B. Did Continental Have Over One Million Square Feet Of Useable Floor Space At Its Facility?

Denver acknowledges that Continental leased greater than one million square feet of floor space within the boundaries of Stapleton. Nevertheless, Denver maintains that Continental's facility contained less than one million square feet during the disputed period if vacant and subleased space were excluded. At oral argument, counsel for Denver conceded that if this Court includes subleased and vacant space in the calculation of total area, then Continental's facility would have exceeded the statutory minimum. We therefore review whether subleased and vacant space should be included in the area requirement of Ordinance 75 de novo, as this determination raises issues of statutory construction.

The Denver City Council expressed the floor space requirement of Ordinance 75 only in terms of "useable floor space." Denver, Colo. Ordinance 75, § 2. There are no other relevant limitations contained in February

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exemption to a "new facility." *Compare* Denver, Colo. Ordinance 75, § 2 *with id.*, § 1.

exemption. Relying on the maxims of statutory construction discussed above, we conclude that the term "useable" must be given its ordinary meaning.

Floor area rented by Continental that was capable of being employed to further the company's transportation operations, whether vacant or subleased to a wholly-owned transportation related subsidiary, was useable. Continental could have occupied the vacant space to further its transportation operations at any time. Furthermore, the subleased space occupied by a wholly-owned subsidiary for the production of airline meals was actually being employed to further Continental's transportation operations at Stapleton. Based on an application of the plain language of Ordinance 75, and the concession that the minimum area requirement is met if inclusive of vacant and sublet space, we find that Continental's Stapleton facility encompassed more than one million square feet during the disputed time period.

C. Did Continental Have to Maintain A Reserve Account?

Even if Continental met all the other prerequisites contained in Ordinance 75, Denver argues that Continental's failure to establish a reserve account disqualifies it from use tax exemption. The reserve requirement states simply that the "exemption may be applicable to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax." Denver, Colo. Ordinance 75, § 2. In the event the transportation utility reduces its total employment to less than two thousand employees at any time during the first

three years, the tax reserve shall be returned to the City of Denver. *Id.*

Consistent with our interpretation of the other relevant provisions of Ordinance 75, we will not address legislative intent when the statutory language is unambiguous. A straight forward reading of the language of the reserve requirement indicates that a reserve account need only be established during the first two years of operation. We conclude that the reserve requirement is not ambiguous and that it should be applied as written. Continental has maintained a transportation facility at Stapleton since 1986 that meets all the substantive prerequisites contained in Ordinance 75. Thus, the requirement mandating that a reserve account be established during the first two years of operation does not apply to disqualify Continental from use tax exemption under Ordinance 75.[3]

VI.

Before turning to the procedural issues raised by the application of Ordinance 75 in the present case, we must address whether Ordinance 568 appropriately applies retrospectively so as to disqualify Continental from a use tax exemption for the entire period. When adopting Ordinance 568, the Denver City Council included a provision stating that the "ordinance shall take effect February 1,

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[3] Because we conclude that the reserve requirement is not applicable on its face, we need not address whether this provision violates the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362.

1991." Denver, Colo. Ordinance 568, § 4. Thus, the Denver City Council intended the revision to apply retrospectively so that Continental would not be eligible for the use tax exemption during the disputed time period. Continental argues that such a retrospective application of the ordinance violates provisions of the Colorado Constitution.

The Colorado Constitution contains two provisions prohibiting retrospective legislation. *See* Colo. Const. art. XV, § 12 ("The general assembly shall pass no law . . . retrospective in its operation, or which imposes . . . a new liability in respect to transactions or considerations already past."); Colo. Const. art. II, § 11 ("No ex post facto law, nor law . . . retrospective in its operation, . . . shall be passed by the general assembly.").[4] We

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[4] We recognize that this dispute concerns the application of a municipal ordinance passed by the Denver City Council, not a statute passed by the Colorado Legislature. Nevertheless, Colorado case law indicates that constitutional considerations with respect to obligations imposed by statute apply with equal force to obligations arising from municipal ordinances. *See, e.g., Colorado Auto Auction Servs. Corp. v. City of Commerce City*, 800 P.2d 998 (Colo. 1990) (en banc) (challenge of city transfer tax ordinance under the federal due process and equal protection clauses); *Cherry Hills Farms, Inc. v. City of Cherry Hills Village*, 670 P.2d 779 (Colo. 1983) (en banc) (challenge of city expansion fee ordinance under the state uniform taxation provision); *Spiker v. City of Lakewood*, 603 P.2d 130 (Colo. 1979) (en banc) (challenge of city rezoning ordinance under state constitutional provision prohibiting special legislation); *Apple v. City and County of Denver*, 390 P.2d 91 (Colo. 1964) (en banc) (challenge of city housing code under due process and retrospective legislation clauses). The Colorado Supreme Court has applied the state constitution prohibition on retrospective legislation to

conclude that Ordinance 568 violates the Colorado prohibition on retrospective legislation because it creates a new use tax liability for transactions that have already taken place.

As repeatedly articulated by the Colorado Supreme Court, a law is retrospective in operation when it " 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.' " *P-W Invs.*, 655 P.2d at 1371 (quoting *Denver, South Park & Pacific Ry. Co. v. Woodward*, 4 Colo. 162, 167 (1878)); *Van Sickle v. Boyes*, 797 P.2d 1267, 1270-71 (Colo. 1990) (en banc) (quoting same). Continental asserts that Ordinance 568 imposes a new disability by changing the use tax exemption criteria for purchases that had already taken place. We agree. The transactions giving rise to the use tax obligation had already taken place when Ordinance 568 made taxable the transactions which were wholly tax-free at the time they occurred. The Denver Code recognizes transfer of title on the date of purchase as the event producing use tax liability. *See, e.g.*, Den.Rev.Mun.C. § 53-111(b) (refund procedure requires application to be made "within sixty (60) days after the purchase of the goods"). Furthermore, "purchase" is defined to take place upon transfer of title or possession. Den.Rev.Mun.C. § 53-95(20). Therefore, purchases made by Continental before August 9, 1991, the effective date of Ordinance 568, were discrete transactions for which Continental was either obligated to pay use tax, or for which

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municipal ordinances. *See Apple*, 390 P.2d at 94; *P-W Invs., Inc. v. City of Westminster*, 655 P.2d 1365, 1370-72 (Colo. 1982) (en banc).

Continental was exempt from use tax under the terms of Ordinance 75. Denver could not permissibly act to change the use tax rules with respect to completed purchases.

Denver, however, argues that Colorado municipalities may act to change tax rules as long as such changes are made before the close of the tax time period. For this proposition, Denver cites *Martin v. Board of Assessment Appeals*, 707 P.2d 348 (Colo. 1985) (en banc), where the Colorado Supreme Court found that a change in the formula or method of computing the amount of property tax due during a given year was not unconstitutionally retrospective. We find the *Martin* case distinguishable on two grounds. First, and most importantly, the *Martin* court addressed only whether a municipality could change assessment factors for an existing property tax during a tax year that had not yet closed. *Id.* at 351-52. In the present case, Ordinance 568 imposes a new use tax on Continental by changing retrospectively the exemption eligibility criteria. The new ordinance made taxable a past event which at the time it took place was a tax-free exchange.

Second, a change in assessment factors as in *Martin* did not produce additional tax liability for a discrete transaction. Property tax liability had already attached based upon ownership during the tax period. In our case, the nature of use tax is such that liability attaches at the time of purchase, when title or possession changes hands. Here, Denver was seeking to impose the use tax for a liability-creating transaction that had already taken place (i.e., purchases made prior to August 9, 1991). Thus, *Martin* is not controlling. Having found that Ordinance

568 operates to repeal retrospectively the use tax exemption criteria of Ordinance 75 in violation of the Colorado Constitution, we hold that Continental was exempt from use tax under the terms of Ordinance 75 for the entire period.[5]

VII.

We next address whether Continental complied with the requisite procedural mechanisms called for in the Denver Ordinance in order to preserve its right to apply for a refund or challenge the assessments. With respect to February, March, and April, 1991, we conclude that Continental failed to comply with the refund application procedures required by the Denver Code and, thus, forfeited any right to a refund or credit for use tax paid. Continental did, however, preserve its right to challenge assessments made by Denver for use tax it withheld during the time period from May 1 through August 8, 1991.

A. Refund Period Procedures

The Denver Code governing use tax provides only one application procedure for obtaining refunds or

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[5] Denver further argues that Ordinance 568 is only a curative modification of Ordinance 75 that is not retrospective new legislation. Given that the parties agree Continental does not qualify for use tax exemption under the terms of Ordinance 568, and that they vehemently disagree whether Continental qualifies under the terms of Ordinance 75 to the point where they have litigated this issue in the bankruptcy court, the district court, and now this Court, we do not find this argument credible.

credits of taxes already paid. A purchaser such as Continental who has paid use tax but claims an exemption under the use tax ordinance may receive a refund upon determination by the revenue manager that the taxpayer is entitled to a refund, but only after complying with all conditions precedent. Den.Rev.Mun.C. § 53-111(a).[6]

There are three conditions precedent. First, the purchaser must apply for a refund "within sixty (60) days after the purchase of the goods." *Id.* § 53-111(b). Second, the purchaser must support the application for refund with an affidavit "accompanied by the original paid invoice or sales receipt." *Id.* Third, the application must contain such substance and be made on forms as set forth by the revenue manager. *Id.* As the parties do not dispute that Continental complied with the third condition precedent, we discuss only the first two conditions.

Denver urges this Court to apply the plain language of the first condition precedent to find that Continental

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[6] Continental alleges that an alternative procedure for challenging use taxes is to file an amended return seeking credit for the amount paid. Continental bases this allegation on disputed testimony from a Denver tax revenue officer that the Department of Revenue has accepted and acted upon amended returns in the past. Counsel for Continental acknowledged at oral argument that such a challenge procedure is not expressly provided for in the Denver Code. Furthermore, tax ordinances providing exemptions should be strictly construed against the taxpayer. *Cf. Atlantic Coast Line R.R. Co. v. Phillips*, 332 U.S. 168, 172 (1947); *American Respiratory Care*, 835 P.2d at 625. The burden lies with the taxpayer to establish by clear and convincing evidence that an alternative procedural appeal mechanism exists and that they complied with its terms. On this record, we conclude that Continental has failed to meet this burden.

failed to timely apply for a refund or credit. In support of this position, the Denver Code defines "purchase" as taking place upon "transfer, conditionally or absolutely, of title or possession or both of the tangible personal property." *Id.* § 53-95(20). Thus, the sixty day appeal time period allowed by the ordinance begins to run upon transfer of title when the tax obligation arises, not at some later date such as when the use tax is due.

Continental would like this Court to interpret the appeal timing provision consistently with the bankruptcy court, which held that the sixty day window does not open until the use tax is payable (approximately twenty days after the close of the month for the particular transaction in dispute). *See Continental Airlines*, 138 B.R. at 438. We find no convincing support for this position and conclude that the sixty day appeal timing provision begins to run from the date of the transaction giving rise to the use tax obligation, not from the date the use tax is due.

When addressing issues of statutory construction, we look first to the statutory language in order to determine the legislature's intent. *Triad*, 812 P.2d at 644; *Kane*, 786 P.2d at 415. Ordinary language should be interpreted according to its plain meaning. *Triad*, 812 P.2d at 644. Here, the plain language of the statute indicates that the refund application must be filed within sixty days after "purchase."

This reading of the plain language of the use tax ordinance is supported by a Colorado Supreme Court case interpreting a similar provision of the state gasoline sales tax. *Armstrong v. Driscoll Constr. Co.*, 110 P.2d 652-53

(Colo. 1941). "The right to a refund rests solely on the statute, which does not authorize any excuse for delay in filing the application therefor." *Id.* at 653. We conclude that the Denver City Council meant what it said, that the sixty day period within which an application for refund must be filed begins to run at the time of purchase.

Applying our interpretation of the Denver Code to the present facts leads to the conclusion that all filings made by Continental with respect to refund period months were not made within the sixty day window. The refund applications for March and April, 1991 were submitted on July 19, 1991. The sixty day period expired at the latest on June 30, 1991 for purchases made in April. The refund period for March purchases expired even earlier. In addition, Continental filed amended use tax returns, seeking tax credits, on dates even further removed from the actual time of purchase. Therefore, we find that Continental failed to comply with the timing requirement contained in the Denver Code in order to apply for a use tax refund for the refund months.

The second condition precedent requires the taxpayer to attach original purchase invoices to its refund application. Continental admits that it failed to attach invoices to its applications. Nevertheless, Continental argues that its filing of use tax returns provided a substantial equivalent to original invoices because both disclose the amount of purchases on which taxes should be paid if owed. Again, we need not plumb the depths of legislative intent when the statutory language is clear on its face. Here, the relevant clause within the refund provision states that the application "must" be accompanied by an "original paid invoice or sales receipt." Den.Rev.Mun.C. § 53-111(b).

Continental's failure to attach invoices to its refund applications for the months of February, March, and April, 1991 was a fatal procedural bar to recovery by refund or credit of use taxes paid.

B. Assessment Period Procedures

Continental's challenge of assessments levied by Denver for failure to pay use tax for the period from May 1 through August 8, 1991 involves a separate appeal provision with different procedural prerequisites. In order to challenge a use tax assessment, the taxpayer must petition the revenue manager by stating the grounds upon which relief should be granted within twenty days of receipt in order to prevent the assessment from becoming final and due. Den.Rev.Mun.C. § 53-117(c). The revenue manager's decision can then be reviewed by the state district court by filing a petition or complaint within thirty days of the date of final decision. Den.Rev.Mun.C. § 53-124.

The bankruptcy court expressly found that "Continental has preserved its right of appeal to the Denver District Court from the Department of Revenue's final assessment for the period May 1-August 8, 1991." *Continental Airlines*, 138 B.R. at 432-33.[7] Implicit in this conclusion is that the bankruptcy court made findings of fact that Continental filed assessment appeals on certain dates. At oral argument, counsel for Denver did not

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[7] Both parties acknowledge that they agreed to stay the proceedings in Denver District Court pending the resolution of this dispute in this Court.

contest that Continental filed the assessment appeals in a timely manner. Further, Denver invoked the jurisdiction of the bankruptcy court for payment of the use tax assessments, which necessarily required a determination of the assessment challenge procedural issues. Without evidence to the contrary, we will not disturb the bankruptcy court's conclusion that Continental complied with the necessary procedures in order to challenge Denver's assessments for use taxes during the assessment period. Because we conclude that Continental met the prerequisites for exemption from use tax during the entire period, and because Continental perfected its appeal of assessments levied by Denver, Denver is not entitled to recover use tax assessments from the bankruptcy estate.

VIII. Conclusion

We conclude that Continental's Stapleton facility complies with all the substantive prerequisites contained in Ordinance 75, such that it was eligible for an exemption from use tax for the entire period (February 1 through August 8, 1991). Further, Ordinance 568 cannot operate to deny Continental eligibility for use tax exemption under Ordinance 75 because the adoption of a retrospective ordinance that imposes a new disability on a taxpayer violates the Colorado Constitution. Nevertheless, Continental failed to comply with procedural requirements contained in the Denver Code which operate to prohibit recovery of use tax paid during the refund period (February, March, and April, 1991). Continental is not entitled to a use tax refund or credit for the refund period months. Continental did comply with the necessary procedures in order to challenge assessments made

by Denver during the assessment period (May, June, July, and August 1-8, 1991). Continental is entitled to a use tax exemption under Ordinance 75 for the assessment period.

Accordingly, we will reverse in part, and affirm in part, the Order of the district court dated January 12, 1993. We will remand to the district court for further remand to the bankruptcy court for entry of an Order denying Denver's motion for payment of an administrative expense claim for unpaid use tax, penalties, and interest during the assessment period, and for the bankruptcy court to enter an Order denying Continental's cross-motion for a refund or credit for use taxes paid during the refund period.

TO THE CLERK OF THE COURT:

Please file the foregoing opinion.

/s/ Robert E. Cowen
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7088

IN RE: CONTINENTAL AIRLINES; CONTINENTAL AIRLINES HOLDINGS, INC.; CHELSEA CATERING CORPORATION; CML HOLDINGS, INC.; TAC 301 CORPORATION; TAC 302 CORPORATION; TAC 303 CORPORATION; TAC 304 CORPORATION; TAC 306 CORPORATION; TAC 307 CORPORATION; TAC 309 CORPORATION; TAC 312 CORPORATION; TAC 313 CORPORATION; TAC 314 CORPORATION; TAC 315 CORPORATION; TAC 318 CORPORATION; TAC 319 CORPORATION; TAC 320 CORPORATION; TAC 321 CORPORATION; TAC 322 CORPORATION; TAC 325 CORPORATION; TAC 326 CORPORATION; TAC 327 CORPORATION; TAC 328 CORPORATION; TAC 329 CORPORATION; TAC 330 CORPORATION; TAC 331 CORPORATION; TAC 332 CORPORATION; TAC 333 CORPORATION; TAC 334 CORPORATION; TAC 376 CORPORATION; TAC 401 CORPORATION; TAC 402 CORPORATION; TAC 811 CORPORATION; TAC 818 CORPORATION; TAC 819 CORPORATION; TAC 820 CORPORATION; TAC 823 CORPORATION; TAC 833-834 CORPORATION; TAC 835 CORPORATION; TAC FUEL MANAGEMENT, INC.; TEXAS AIR LEASING CORPORATION; BRITT AIRWAYS, INC.; ROCKY MOUNTAIN AIRWAYS, INC., CONTINENTAL AIRLINES HISTORICAL SOCIETY, INC.; CONTINENTAL AIR MANAGEMENT SERVICES, INC.; CONTINENTAL-TRUK HOTEL CORPORATION; FRONTIER AIRLINES, INC.; NEW YORK AIRLINES, INC.; SYSTEM ONE HOLDINGS, INC.; SYSTEM ONE TRAVEL RESOURCES, INC.; SYSTEM

ONE DIRECT ACCESS, INC.; MAXPIU INTERNATIONAL, INC.,

Debtors.

PATRICIA BEER, MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER, COLORADO,

v.

CONTINENTAL AIRLINES; CONTINENTAL AIRLINES HOLDINGS, INC.; CHELSEA CATERING CORPORATION; CML HOLDINGS, INC.; TAC 301 CORPORATION; TAC 302 CORPORATION; TAC 303 CORPORATION; TAC 304 CORPORATION; TAC 306 CORPORATION; TAC 307 CORPORATION; TAC 309 CORPORATION; TAC 312 CORPORATION; TAC 313 CORPORATION; TAC 314 CORPORATION; TAC 315 CORPORATION; TAC 318 CORPORATION; TAC 319 CORPORATION; TAC 320 CORPORATION; TAC 321 CORPORATION; TAC 322 CORPORATION; TAC 325 CORPORATION; TAC 326 CORPORATION; TAC 327 CORPORATION; TAC 328 CORPORATION; TAC 329 CORPORATION; TAC 330 CORPORATION; TAC 332 CORPORATION; TAC 333 CORPORATION; TAC 334 CORPORATION; TAC 376 CORPORATION; TAC 401 CORPORATION; TAC 402 CORPORATION; TAC 811 CORPORATION; TAC 818 CORPORATION; TAC 819 CORPORATION; TAC 820 CORPORATION; TAC 823 CORPORATION; TAC 833-834 CORPORATION; TAC 835 CORPORATION; TAC FUEL MANAGEMENT, INC.; TEXAS AIR LEASING CORPORATION; BRITT AIRWAYS, INC.; ROCKY MOUNTAIN AIRWAYS, INC.; CONTINENTAL AIRLINES HISTORICAL SOCIETY, INC.; CONTINENTAL AIR MANAGEMENT SERVICES, INC.; CONTINENTAL-TRUK HOTEL CORPORATION; FRONTIER AIRLINES, INC.; NEW YORK AIRLINES, INC.; SYSTEM ONE HOLDINGS, INC.; SYSTEM ONE TRAVEL RESOURCES, INC.; SYSTEM ONE DIRECT ACCESS, INC.; MAXPIU

INTERNATIONAL, INC.

THOMAS E. ROSS,

Trustee

Continental Airlines, Inc.,

Appellant

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, COWEN and SEITZ, *Circuit Judges*

The petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the panel, and no member of the panel having asked for rehearing, the petition for panel rehearing is denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: OCT 21 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7088

In Re: Continetal [sic] Airlines

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until JANUARY 19, 1994.

/s/ Robert E. Cowen
Circuit Judge

Dated: NOV 17 1993

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: CONTINENTAL AIRLINES, INC., et al., Debtors.	:	
PATRICIA BEER, Manager of Revenue of the City and County of Denver, Colorado, Appellant,	:	Civil Action No. 92-244-JJF
v.	:	
CONTINENTAL AIRLINES, INC., et al., Appellees.	:	

ORDER

At Wilmington this 12 day of January, 1993, for the reasons set forth in the Opinion issued this date,

IT IS HEREBY ORDERED that the Decision and Order of the Bankruptcy Court dated February 4, 1992, is REVERSED.

/s/ Joseph J. Farnan, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: CONTINENTAL AIRLINES, INC., et al., Debtors.	:	Civil Action No. 92-244-JJF
PATRICIA BEER, Manager of Revenue of the City and County of Denver, Colorado, Appellant, v. CONTINENTAL AIRLINES, INC., et al., Appellees.	:	

S. David Peress, and Paul P. Welsh, of MORRIS NICHOLS ARSHT & TUNNELL, Wilmington, Delaware. Attorneys for Debtors/Apppellees [sic] Continental Airlines, Inc., et al.

Jeoffrey L. Burtch, of COOCH & TAYLOR, Wilmington, Delaware. Attorneys for Appellant Manager of Revenue of the City and County of Denver, Colorado.

OPINION

January 12, 1993

Wilmington, Delaware

/s/ Joseph J. Farnan, J.
FARNAN, District Judge.

Presently before the Court is the appeal of the City and County of Denver, Colorado, of the February 4, 1992 Order and Opinion of the United States Bankruptcy Court for the District of Delaware ("the Bankruptcy Court"). The Bankruptcy Court determined that Continental Airlines, Inc. was entitled to an exemption for certain use taxes from February, 1991, through August, 1991. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(d).

I. PROCEDURAL HISTORY

On August 16, 1991, the City and County of Denver, Colorado ("Denver") filed a Motion for Payment of Administrative Expenses in the Bankruptcy Court pursuant to 11 U.S.C. § 503(a),(b)(1)(B)(i) and (C). In the motion, Denver claimed that it was owed certain use taxes in the amount of $1,494,940.00 plus penalties and interest. Denver amended its motion on October 1, 1991, to seek additional interest and penalties, bringing the total amount sought to $1,684,874.60. This figure represents past due taxes plus interest and penalties from May 1, 1991, to August 8, 1991.

Continental Airlines, Inc. ("Continental") denied liability and filed a Cross Motion for Determination of Tax Liability under 11 U.S.C. § 505. Continental sought to

have the Bankruptcy Court determine that it was exempt from tax assessment during the May 1, 1991 to August 8, 1991 time period. Moreover, Continental sought refunds and/or credits totalling $1,259,271.58 for use taxes paid from February 1, 1991 through April 30, 1991.

The Bankruptcy Court held a hearing on the motions on October 24, 1991 and, on February 4, 1992, the Bankruptcy Court issued its decision. The Bankruptcy Court ordered that Denver's motion for payment of administrative expenses be denied and granted Continental's cross motion. Insofar as the tax credits and refunds were concerned, the Bankruptcy Court ordered Denver to calculate the credits for February and March, 1991 as well as the refund due for April, 1991. The Court further ordered that interest was to accrue from February 4, 1992.

II. THE BANKRUPTCY COURT DECISION

According to the Bankruptcy Court, the key issue in the controversy between Denver and Continental is the meaning of the term "facility" within the context of ordinances enacted by Denver in February, 1991. According to the Bankruptcy Court's Opinion, if the term "facility" refers to only a single enclosed building, the exemption would not apply to Continental's operation at Stapleton Airport in Denver. *In the Matter of Continental Airlines, Inc.*, 138 B.R. 430, 435 (D. Del. 1992). If, on the other hand, "facility" refers to one or more buildings, then Continental was exempt from the use tax. *Id.* Thus, the critical task before the Bankruptcy Court was to interpret Denver Ordinance No. 75 which exempted sales of personalty from certain Denver sales and use taxes so long as the

personalty was "to be used, consumed, stored, or distributed at a facility . . . (b) that contains at least one million square feet of useable floor space and (c) that serves as a . . . regular place of reporting for duty for at least two thousand employees." Denver Ordinance No. 75, Series of 1991, effective February 1, 1991, Den. Rev. Mun. Code § 53-97(17) (the February exemption or Ordinance No. 75).

The Bankruptcy Court began its interpretation analysis by discussing that Denver is a "home rule" municipality organized under the Colorado Constitution. *In the Matter of Continental,* 138 B.R. at 435. Thus, any local ordinances that are in conflict with state law supersede the state law within the territorial limits of the municipality. *Id.* citing, Colo. Const., Art. XX, § 6. Thus, the Bankruptcy Court concluded that the Denver sales and use tax provisions superseded any contrary state tax statutes so long as the local ordinance comported with state constitutional requirements. *Id.*

Under Colorado law, when interpreting statutes, "words and phrases shall be read in context and construed according to the rules of grammar and common usage." *Id.* citing Colo. Rev. Stat. Ann. § 2-4-202 (1991). Further, legislative intent is to be considered only in the event that the statute is ambiguous as to the legislature's intent. *Id. at 436,* citing *City of Littleton v. Board of County Com'rs of Arapahoe County,* 787 P.2d 158, 161 (Colo., 1990).

Given this background, the Bankruptcy Court determined that the term facility as used in Ordinance No. 75 is broad enough to encompass multiple buildings so long as they exist to carry out a common purpose. *Id.* The

Bankruptcy Court noted the term facility is not defined in Ordinance No. 75 and so it looked to the definition appearing in Webster's Third New International Dictionary, unabridged (1981) and to one provided by a Colorado tax statute that relates to enterprise zones. *Id.* The Bankruptcy Court reasoned that absent a controlling definition the Court must rely on the common meaning of a term. The Bankruptcy Court found that in the context of an airport hub, common usage would direct the Court to find that multiple buildings comprise a facility. *Id.* Thus, the Bankruptcy Court concluded that Continental's operation at Stapleton is a facility because it is "operated for the purpose of transporting passengers and cargo, naturally consists of multiple buildings and area, all of which are necessary to the operation." *Id.*

Next, the Bankruptcy Court considered the arguments of Denver as to whether Continental met all the criteria for the tax exemption. One argument advanced by Denver was that Continental's facility did not contain "at least one million square feet of useable floor space" as required by Denver Ordinance No. 75. *Id.* The Bankruptcy Court concluded the issue was the amount of space leased by Continental, not the amount actually physically occupied by it. The parties stipulated to the following facts: (1) Continental's lease agreement encompasses at least one million square feet of useable space; (2) Stapleton is an "enterprise zone" within the meaning of Ordinance No. 75; and (3) at least two thousand Continental employees report to work at Stapleton. *Id.* Thus, the Bankruptcy Court concluded Continental met all of the requirements of Ordinance No. 75 and was entitled to a tax exemption under the February 1991 exemptions. *Id.*

In August, 1991 however, the February exemptions were repealed and new exemptions were adopted. *Id.* The parties stipulated that under the new ordinance, Ordinance No. 568, Continental would not qualify for a tax exemption but disagreed as to the retroactive effect of Ordinance No. 568. *Id.*

After considering the language of Ordinance No. 568, the preamble to Ordinance No. 568 and Colorado's case law relating to retroactive application of new legislation, the Bankruptcy Court concluded that Ordinance No. 568 was not to be applied retroactively. *Id.* at 437. The Bankruptcy Court reached this conclusion despite the fact that section 4 of Ordinance No. 568 stated that the amended use tax exemption was to be retroactively applied to February 1, 1991.[1] *Id.*

Finally, the Bankruptcy Court considered whether Continental was entitled to a refund or credit for overpaid taxes for February, March, and April, 1991. *Id.* at 438. With respect to this issue, Continental conceded that it filed its March claim one month late, and never filed a claim for February. *Id.* The Bankruptcy Court held that Continental was entitled to a refund for the April payment as it was timely filed, however with respect to the February and March payments, the Bankruptcy Court

---

[1] According to the preamble of the August ordinance, the legislature was amending the tax exemption because it understood that "no facility, building, or enclosed structure or group of such facilities, buildings or enclosed structures currently, as of the date of this enactment, and at all times prior thereto meets the eligibility criteria established for the exemptions granted by Ordinance 75 . . . " *Id.* at 437-438.

decided Continental was entitled only to a credit based on the filed amended tax returns. *Id.*

III. THE PARTIES' CONTENTIONS

In its appeal, Denver raises several grounds for challenging the decision of the Bankruptcy Court.

A. JURISDICTIONAL CHALLENGES

As a preliminary matter, Denver challenges the jurisdiction of the Bankruptcy Court to grant a refund or credit to Continental for the Denver use taxes paid. According to Denver, the Bankruptcy Court erred, as a matter of law, in entertaining Continental's Cross motion under 11 U.S.C. 505(a). (Docket Item ("D.I.") 8, pp. 31 - 41).

Denver concedes that a Bankruptcy Court is given broad authority under 11 U.S.C. § 505(a) to determine the amount or legality of any tax imposed. (D.I. 8, p. 31). But, Denver contends § 505(a) provides two explicit exceptions to the Bankruptcy Court's authority:

> (2) the court may not so determine –
>
> (A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or
>
> (B) any right of the estate to a tax refund, before the earlier of –

> (i) 120 days after the trustee properly requests such refund, from the governmental unit from which such refund is claimed; or
>
> (ii) a determination of such governmental unit of such request.

11 U.S.C. § 505(a)(2). Denver, while conceding that the first exception to the Bankruptcy Court's power does not apply, argues that the second exception is applicable. (D.I. 8 at 32). According to Denver, the "request" referred to in 11 U.S.C. § 505(a)(2)(B)(ii) is any request for a refund properly made by the trustee as referred to in 11 U.S.C. § 505(a)(2)(B)(i). (D.I. 8 at 32). Further, Denver contends a request is only properly made by the trustee when done so in a timely manner under local law. (D.I. 8, p. 32).

Denver argues that Continental failed to properly request a refund because it did not file a claim within the limitations period set forth by the Denver Municipal Code and, when it did submit a claim, Continental failed to attach the proper documentation. (D.I. 8, p. 34). In arguing this ground for appeal, Denver focuses on the statutory framework provided by the Denver Municipal Code for what constitutes a timely filing and concludes that none of the requests for a refund were timely. Thus, Denver concludes that the Bankruptcy Court did not have jurisdiction to grant Continental a refund. (D.I. 8, pp. 34-37).

As a second jurisdictional challenge, Denver argues that even if the Court ignored the specific exceptions to a grant of power under 11 U.S.C. § 505(a)(2) the Bankruptcy Court was still without jurisdiction as 11 U.S.C. § 505 cannot be used to revive a claim that is stale due to

the expiration of a limitations period. (D.I. 8, p. 39). According to Denver, because the statute of limitations is a jurisdictional question and Continental failed to raise a claim prior to the expiration of the limitations period, the Bankruptcy Court was without jurisdiction to determine Continental's entitlement to a refund or credit. (D.I. 8, pp. 39-41).

Continental responds that their right to a tax refund or credit was properly before the Bankruptcy Court under 11 U.S.C. § 505(a) and was before the Court by way of Denver's motion for administrative expenses pursuant to 11 U.S.C. § 503. (D.I. 11, pp. 37-38). According to Continental, the Bankruptcy Court was the only Court with jurisdiction to entertain Denver's administrative claim and once that process began, it would be duplicative for all issues relating to the use tax not to be determined in one proceeding. (D.I. 11, pp. 38-40).

With respect to the specific exceptions of jurisdictional power present in 11 U.S.C. § 505(a)(2), Continental disagrees with Denver's interpretation of § 505(a)(2)(B). (D.I. 11, p. 41). According to Continental, the second exception provides a time limitation for the Court to determine the right to a tax refund rather than providing for an express denial of jurisdiction. (D.I. 11, p. 41). Subpart (2) of subsection (a) provides that the court "may not so determine – any right of the estate to a tax refund, before the earlier of" and then provides two timing events. (D.I. 11, p. 41). Continental contends it has already fulfilled one of these timing requirements and therefore, the other is irrelevant in deciding the Bankruptcy Court's jurisdiction. (D.I. 11, p. 41). Continental contends that the Bankruptcy Court was vested with the

authority to hear its claim on August 15, 1991, the date the City of Denver denied its request for a refund because the local taxing authority made a determination in the matter, and thus the earlier of the two time frames was fulfilled. (D.I. 11, p. 41).

With respect to whether the claim by Continental was properly filed or not, Continental concedes it did not timely file its March, 1991 claim for refund and requested the Bankruptcy Court to consider its claim a request for a credit. (D.I. 11, p. 42). However, with respect to the April refund request, Continental claims it was timely filed and therefore properly before the Court. (D.I. 11, p. 42). In this regard, Continental cites Denver legislative authority, case law and public policy for the propositions that: (1) an original filing is not required; (2) a claim for refund is deemed filed upon mailing to the Manager of Revenue; (3) a claim for refund is not due until 60 days after the filing was required, as opposed to Denver's contention that the 60 days begins running prior to the time the original filing was due; and (4) Continental complied with all reasonable procedural requirements of the Denver Claim for Refund process. (D.I. 11, pp. 42-46).

Finally, Continental argues that although refund claims for February and March 1991 would have been untimely, it filed amended returns to provide the Bankruptcy Court with a record to determine the amount of credit to which Continental was entitled. (D.I. 11, p.47). Thus, the 60 day time limit applicable to the claim for a refund is not a proper limitations period with respect to February and March claims as those claims were for a credit, not a refund. Further, the 60 day limitations period was met for the April claim for refund and thus, the

Bankruptcy Court had the authority to determine Continental's right to a refund for April and its right to credits for February and March pursuant to 11 U.S.C. § 505. (D.I. 11, p. 47).

B. APPLICABILITY OF ORDINANCE NO. 75

1. MEANING OF THE TERM FACILITY

Denver contends the Bankruptcy Court made an error of law by not construing the term facility in Ordinance No. 75 to mean "a new single building." (D.I. 8, p. 7). According to Denver, the ordinance applies only to single structures and the Bankruptcy Court erred in applying the exemption to Continental's multiple buildings and leased areas at Stapleton Airport. (D.I. 8, p. 7).

Denver further argues that the Bankruptcy Court improperly applied a state statutory definition of the term facility when considering a municipal ordinance of a "home rule" city. (D.I. 8, p. 20). According to Denver, the Bankruptcy Court should not have turned to a state statute for a definition of the term facility because definitions that appear in local ordinances supersede the definition appearing in a state statute pursuant to Denver's status as a "home rule" city.

Finally, Denver contends that the word facility appears in the ordinance only in the singular and pluralizing it changes the meaning and intent of the legislature. In further support of this contention, Denver presents the Court with several instances where Continental has pluralized the use of the word facility when referring to its operations at a given airport and uses the

word in its singular form when referring to a single structure at a given airport. Therefore, according to Denver, Continental views its operations within an airport as comprising multiple facilities, not just one. (D.I. 8, p. 21).

Continental responds that under the clear and unambiguous language of Ordinance No. 75, the Bankruptcy Court properly concluded that their operation at Stapleton Airport would be considered a facility. (D.I. 11, pp. 16-17). According to Continental, only by inserting words and doing a "tortured construction" of the original language can one find that the ordinance was to apply only to new, single structure buildings. (D.I. 11, p. 17).

Continental further contends that when considered in light of Colorado's statutory mandate that all "words and phrases shall be read in context and construed according to the rules of grammar and common usage" Denver's interpretation of the ordinance must fail. Colo. Rev. Stat. § 2-4-101 (1986); Den. Rev. Mun. Code § 1-3 (1990). (D.I. 11, p. 17). Continental argues that Denver's interpretation of the term facility conflicts with state tax statutes, in that there is no limitation that all areas must be included in a single unit. Thus, Continental asserts the Bankruptcy Court was correct in holding that multiple buildings could comprise a facility. (D.I. 11, pp. 18-19). Thus, according to Continental, the Bankruptcy Court appropriately applied all governing rules of statutory construction and came to the appropriate conclusion that Continental's operation at Stapleton Airport is a facility within the meaning of Ordinance No. 75.

Finally, Continental points to the City Council's contemporaneous enactment of Ordinance No. 74. Ordinance No. 74 specifically refers to the requirement that a structure be newly erected to qualify for a business occupation privilege tax exemption, an exemption Continental did not seek. Thus, Continental argues that had Denver intended to limit Ordinance No. 75 to a newly erected single unit it would have expressly done so and the absence of such language is clear evidence that Denver did not intend such a limitation. (D.I. 11, p. 20).

2. OTHER REQUIREMENTS OF ORDINANCE NO. 75

Denver contends that although Continental leases more than 1,000,000 square feet of useable floor space at or near Stapleton Airport, it is not in a single building and when considered separately, Continental has no single building that meets the 1,000,000 or more square footage requirement of Ordinance No. 75. (D.I. 8, pp. 8-9). Further, Denver argues that no single structure of Continental's at Stapleton Airport has 2,000 or more employees that report to it.

Continental claims that there is no requirement that all the useable area actually be in use, be in the same building or have all two thousand plus employees report to it. (D.I. 11, p. 20-22). Rather, according to Continental, so long as they are obligated by a lease to rent over 1,000,000 square feet, they have fulfilled the space requirement of Ordinance No. 75. Further, Continental argues that they have over 6,000 employees who report to

work at Stapleton and that more than fulfills the employment requirement. (D.I. 11, p. 24).

C. RESERVE ACCOUNT REQUIREMENT

Alternatively, Denver contends that the Bankruptcy Court erred, as a matter of law, by failing to apply to Continental all requirements listed in Ordinance No. 75. (D.I. 8, p. 22). In so arguing, Denver claims that the last paragraph of Ordinance No. 75 contains a condition precedent to the applicability of the exemption, and that Continental has failed to meet this condition, (D.I. 8, pp. 22-23). The last paragraph of Ordinance No. 75 reads as follows:

> This exemption may be applicable to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

Ordinance No. 75. According to Denver, the Bankruptcy Court failed to address this portion of the ordinance in construing the statute and applying it to the facts before it. Reading this paragraph as a condition of the exemption, Denver claims Continental is not entitled to the use tax exemption as Continental has conceded that it did not establish such a reserve account.

Continental responds that because it was in its fifth year of operation at Stapleton, the reserve provisions of

the last paragraph of Ordinance No. 75 are wholly inapplicable to their operation. (D.I. 11, p. 24). In Continental's view, the last paragraph permits a reserve account to be established for any new facility entitled to such an exemption so that monies would exist and be set aside for the purpose of paying the exempted taxes in the event that following the third year of operation the facility no longer qualified. (D.I.–11, p. 24). Finally, Continental asserts that even if the Ordinance required it to establish the reserve account, it was prohibited from doing so because of the automatic stay provisions of the Bankruptcy Code. (D.I. 11, pp. 24-25).

D. EFFECT OF ORDINANCE NO. 568

As discussed earlier (supra, p. 5), in August, 1991 the Denver City Council repealed Ordinance No. 75 by enactment of Ordinance No. 568, Series of 1991, effective February 1, 1991, Den. Rev. Mun. Code § 53-97(17) (August 9, 1991) ("Ordinance No. 568" or "the August exemption"). In Ordinance No. 568, the City Council clarified their intent in enacting Ordinance No. 75, repealed Ordinance No. 75, redefined the requirements for the application of the use tax exemption, and provided for retroactive application of the amendment for a limited time period. *See*, Denver Co. Ordinance No. 568 (1991).

Denver contends that the Bankruptcy Court erred as a matter of law: (1) by concluding that Ordinance No. 568 did not have retroactive effect; and (2) by concluding that the intent expressed in Ordinance No. 568 was not controlling in determining the definition of facility under Ordinance No. 75. (D.I. 8, pp. 23 - 30). Denver argues that

retroactive application of Ordinance No. 568 does not offend either the United States Constitution or the Constitution of the State of Colorado. (D.I. 8, p. 25). Denver asserts that under the Colorado Constitution, retroactive application of legislation is proper so long as it "does not impair vested rights, create new obligations or duties, or attach disabilities with respect to past transaction." (D.I. 8, p. 26 (citing, *Zaragoza v. Director of Dept. of Revenue*, 702 P.2d 274, 276 (Colo., 1985))). Denver argues that Ordinance No. 568 does not create new obligations or duties because, under Colorado case law, tax provisions may be retroactively applied so long as it is not harsh, arbitrary or unfair. (D.I. 8, pp. 26-27). Thus, Denver argues Ordinance No. 568 is entitled to great weight in the interpretation of Ordinance No. 75. (D.I. 8, p. 30).

Continental, on the other hand, responds that retroactive application of Ordinance No. 568 would violate Article II, § 11 of the Denver Constitution which prohibits *ex post facto* legislation. (D.I. 11, p. 26). According to Continental, the Constitution prohibits implementing laws that would retroactively affect obligations and therefore, the application of Ordinance No. 568 would create new obligations that Continental would be subject to.

Further, Continental argues that the August 1991 amendments do not merely clarify the earlier ordinances, rather they substantially change the meaning of those ordinances and as such should not be retroactively applied. (D.I. 11, pp. 35). Finally, Continental contends that retroactive application of the August 1991 amendments would violate the United States Constitution by offending the Due Process Clause of the Fourteenth Amendment. (D.I. 11, pp. 35-37).

IV. STANDARD OF REVIEW

On appeal of a Bankruptcy Court decision, the district court is to show deference to the Bankruptcy Court's findings of fact unless they are found to be clearly erroneous. Fed. R. Bankr. P. 8013; *Sharon Steel Corp. v. National Fuel Gas Distribution Corp.*, 872 F.2d 36, 38-39 (3d Cir. 1989). However, legal questions are subject to plenary review. Fed. R. Bankr. P. 8013. Generally, questions of statutory construction are considered questions of law and thus, on appeal, subject to *de novo* consideration. *In re Sierra Steel Corp.*, 88 B.R. 314, 316 (D. Colo., 1987).

While the determination of whether a statute is ambiguous or not may be subject to a clearly erroneous standard, the interpretation of that statute regardless of its ambiguity is a plenary consideration. *See, In re Barclay Industries, Inc.*, 736 F.2d 75, 78 (3d Cir. 1984); *Matter of Dunes Casino Hotel*, 63 B.R. 939, 944 (D.N.J. 1986).

V. DISCUSSION

A. JURISDICTIONAL CHALLENGES

Title 11 U.S.C. § 505(a) grants the Bankruptcy Court broad authority to hear issues related to the determination of a debtor's tax liability. This authority includes the ability to determine:

> [t]he amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before

> and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

11 U.S.C. § 505(a)(1). While the authority of the Bankruptcy Court is broad, it is not unrestricted. As previously discussed there are two express restrictions on the authority of the Bankruptcy Court to make such determinations. They are:

> (2) The Court may not so determine –
>
> (A) the amount or legality of a tax, fine, penalty or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or
>
> (B) any right of the estate to a tax refund, before the earlier of –
>
> (i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or
>
> (ii) a determination by such governmental unit of such request.

11 U.S.C. § 505(2)(A), (B).

Denver contends that the Bankruptcy Court's jurisdiction was limited by 505(2)(B). Title 11 U.S.C. § 505(2)(B) provides that the Bankruptcy Court is without power to determine the estate's right to a tax refund prior to the earlier of two alternative conditions. The first condition requires a minimum of 120 days to pass from the time the trustee requests the governmental unit to

make such a refund. 11 U.S.C. § 505(2)(B)(i). The second condition is a determination by the governmental unit regarding the refund. 11 U.S.C. § 505(2)(B)(ii). Thus, the trustee must have either permitted sufficient time to pass following the request for a refund or the government unit, with power to review a request for refund, must have issued a determination prior to raising the question in the Bankruptcy Court. If neither of these conditions are met, then the Bankruptcy Court is without jurisdiction.

The Court concludes that the earlier of the two provisions in 505(a)(2)(B) occurred on August 15, 1991. There is no question that on August 15, 1991 the Department of Revenue for the City and County of Denver issued a decision regarding the claim for a tax refund submitted by Continental. Thus, the Court concludes that the exception limiting the Bankruptcy Court's power to determine a claim for a tax refund is inapplicable in this case and the Bankruptcy Court properly entertained the Cross Motion for Determination of Tax Liability filed by Continental.

Denver would have this Court read into 505(a)(2)(B) a provision that is not present. Denver's argument is that only claims for refunds that are timely asserted to the local governmental entity may later be raised in a bankruptcy proceeding and therefore since the Denver Department of Revenue determined the requests for refunds were not timely, the Bankruptcy Court was without power to consider the claims. The Court disagrees. The broad grant of power in § 505 cannot fail merely because of a procedural default by the trustee. To decide otherwise would be to say only determinations of a substantive nature are reviewable in a bankruptcy hearing

and that any potential procedural default of the trustee cannot be considered by the Bankruptcy Court.

Further, the Court does not agree with Denver's assertion that the time for requesting a refund is the equivalent of a statute of limitations. The Court concludes that the timeliness of the request for a refund does not act as a statute of limitations bar for consideration by the Bankruptcy Court of a tax claim. The Denver Department of Revenue apparently agrees. The Department of Revenue disallowed the refund based primarily on untimeliness, but also referred to the merits of the claim in denying the refund.

Alternatively, the Court concludes the only claim subject to the restrictions in section 505(a)(2)(B) was the claim by Continental for an April, 1991 refund. Continental was requesting a credit for the February and March 1991 taxes paid rather than a refund and thus, under the Bankruptcy Code the Bankruptcy Court would have full authority to determine the "amount or legality of these taxes" pursuant to 505(a)(1).

After Continental converted the claims for February and March, 1991 taxes paid into ones for a tax credit the restrictions of section 505(a)(2) were no longer applicable. The Bankruptcy Code clearly delineates between determinations regarding the amount and legality of taxes and those requests for refunds. Only in the later case is the Bankruptcy Court's authority restricted so as to afford the local governmental agency an opportunity to review the request. Therefore, the February and March, 1991 requests for a tax credit could not, under any circumstances, be subject to the restrictions present in section

505(a)(2), only the April request, which remained one for a refund, could be subject to the restrictions present.

With respect to the April tax refund request, the Bankruptcy Court found that the request was filed on July 19, 1991, within the 60 day time limit imposed under Denver Municipal law. *Opinion* at p. 438. The appeal does not turn on this decision and the Court finds there is support in the record to make such a finding. Thus, this Court cannot say that the Bankruptcy Court's finding was clearly erroneous. Therefore, the request for a refund of April taxes was timely filed within the provisions of the Denver Code. In sum, the Court concludes the Bankruptcy Court had jurisdiction to determine Continental's entitlement to tax credits and refunds for February through April, 1991.

B. INTERPRETATION AND APPLICABILITY OF ORDINANCE NO. 75

Having concluded the Bankruptcy Court had jurisdiction to determine Continental's tax liability the Court may now turn to other issues raised by Denver. Under Colorado law, Courts must strictly construe tax exemption statutes against the taxpayer and it is the burden of the taxpayer to prove they are entitled to the exemption by clear and convincing evidence. *Atlantic Coast Line R. Co. v. Phillips*, 332 U.S. 168, 172, 67 S. Ct. 1584, 91 L.Ed. 1977 (1947); *American Respiratory Care Services v. Manager of Revenue, City and County of Denver*, 835 P.2d 623, 625 (Colo. App., 1992) (citations omitted); *Denver Center for the Performing Arts v. Briggs*, 696 P.2d 299, 308 (Colo., 1985); *State v. Fisch's Estate*, 153 Colo. 525, 387 P.2d 282,

285 (Colo., 1963); Den. Rev. Mun. Code § 53-11. Thus, only if Continental meets the requirements of the statute, as interpreted by the Court, will they be entitled to the exemption provided for in Ordinance No. 75.

The Court's review of the Bankruptcy Court's interpretation and application of Ordinance No. 75 and it terms, including the use of the term "facility", is plenary. In Colorado, principles of statutory construction are equally applicable in the interpretation or construction of municipal ordinances. *American Respiratory Care Services v. Manager of Revenue, City and County of Denver,* 835 P.2d 623, 625 (Colo. App. 1992). Therefore, it is necessary to consider the guidance relating to statutory construction that is available in the law of Colorado.

Under Colorado law, "the primary objective is to ascertain the intent of the General Assembly for the language used, and give effect to that intent if possible." *American Respiratory Care Services,* 835 P.2d at 625 (1992), *citing, Stephen v. City and County of Denver,* 659 P.2d 666 (Colo., 1983); *People v. District Court, Second Judicial Dist.,* 713 P.2d 918 (Colo., 1986). In order to determine the legislative intent, the Court first looks to the language of the statute itself. *American Respiratory Care Services,* 835 P.2d at 625; *People v. Warner,* 801 P.2d 1187 (Colo., 1990); *Griffin v. S.W. Devanney & Co., Inc.,* 775 P.2d 555 (Colo. 1989). With respect to the language found in a statute "words and phrases shall be read in context and construed according to the rules of grammar and common usage." *American Respiratory Care Services,* 835 P.2d at 625; Colo. Rev. Stat. § 2-4-101; Den. Rev. Mun. Code § 1-3. If the language is clear and the intent appears with reasonable certainty, there is no need to resort to other rules of

statutory construction. *People v. District Court, Second Judicial Dist.*, 713 P.2d at 918.[2]

1. Meaning of Term "Facility" as used in Ordinance 75

The Court will first review the Bankruptcy Court's findings and conclusions with regard to the meaning of the term "facility" in Ordinance No. 75.

a. Ordinary Meaning of Words

In construing the term facility in Ordinance No. 75 the Bankruptcy Court, in applying the common usage of the word principle, turned to Webster's Third New International Dictionary, unabridged (1981) to obtain a definition.

A Court is instructed to determine the common usage of a word, but to do so "in context." Colo. Rev. Stat. § 2-4-101; Den. Mun. Rev. Code § 1-3. In this case, the context in which the word facility was used in the subject ordinance is clearly in relation to a "transportation utility." *See* Ordinance No. 75. Thus, in determining the plain meaning of the word facility, the Court is required to do so in the context of a transportation utility.

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[2] The Bankruptcy Court interpreted the *City of Littleton*, 787 P.2d 158 as standing for the proposition that only in cases where the statute is found to be ambiguous should a Court turn to legislative intent for statutory construction purposes. Clearly, however, under Colorado law, the controlling principle is that the Court is instructed to uphold the legislative intent in enacting a statute.

Denver has cited several statutes and regulations that contain a definition of the word facility in relation to a transportation facility that would indicate it refers to a single building, rather than multiple buildings within the context of an airport. (D.I. 8, pp ___; D.I. 14 pp. 7-9). Further, Denver provided the Court with examples of Continental itself using the word facility to indicate a single building and the word facilities when indicating multiple buildings within the context of an airport. (D.I. 9, ex. 20).

It is clear that the term facility has a much narrower meaning when considered in the context of a transportation utility, than the meaning or definition set forth in Webster's. Since the Court's task is to determine the meaning of a disputed term "in context" the Court concludes that the Bankruptcy Court erred in considering a general definition of facility from Webster's Dictionary without giving consideration to the context in which it was being used.

In this regard, it is difficult to determine the meaning of the term facility with reasonable certainty by a plain reading of Ordinance No. 75 because the Court finds the term facility as used in Ordinance No. 75 to be reasonably subject to differing meanings. The Court concludes the term facility is ambiguous. Thus, a review of the legislative history regarding the enactment of the ordinance is helpful to determine the intent of the legislative body.

b. Legislative Intent

Denver claims that its intent in enacting the ordinance was to attract new transportation utilities to the Denver area. Denver supports its contention with certified copies of the agenda, minutes and handouts from the meeting at which Ordinance No. 75 was considered and passed. (*See,* D.I. 9, tab 12). The Bankruptcy Court sustained the objection of Continental when Denver attempted to move these exhibits into evidence on the grounds that the statute was not ambiguous and therefore the legislative history was not relevant. (D.I. 9, tab 6, Transcript pp. 214-216).[3]

The Court finds that the Bankruptcy Court erred when it excluded the legislative history exhibits, particularly because of the need to consider the intent of the Denver City Council in enacting Ordinance No. 75. Thus, the Court will utilize the offered exhibits in its effort to capture the legislative intent of the subject ordinance.

In reviewing the minutes of the Economic and Cultural Development Committee, it is clear the intent of the committee members in considering the enactment of Ordinance No. 75 was to attract a proposed United Airlines Maintenance Facility. (D.I. 9, tab 12, pp. A-94, A-96 and A-97). The supporting documentation relating to the economic impact to the Denver area of the proposed

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[3] Another ground for objection to the certified copies being admitted into evidence was stated as follows: "[i]f somebody wants to argue about what they [the statutes] mean in briefs at some point, they can go ahead and do it. Everybody can read legislative history and use it, but it is not evidence and should not be admitted on that basis . . . " (D.I. 9, tab 6, p. 215).

United Airlines Maintenance Facility indicates there would be approximately 1.5 million new square feet built and utilized under one roof. Further, as proposed, there would have been sufficient jobs created to meet the employment criterion to be required in Ordinance No. 75. (D.I. 9, tab 12, pp. A-96 and A-97). This evidence supports Denver's contention that it intended only to exempt a facility from use taxes if the facility was new and consisted of a single structure.

The Court cannot ignore the clear intent of the committee and the council with regard to the type of facility intended to be exempted by Ordinance No. 75. The clear intent of the City Council was to attract new transportation utilities like United to the Denver area; it was not to provide operating utilities, such as Continental, with a tax break. By attracting new utilities or having current utilities expand into a new facility, Denver intended to increase its job base and support new economic development. The Court concludes that the intent at the time of the enactment of Ordinance No. 75 was to create a tax exemption for transportation utilities, such as airlines, within the Denver enterprise zone, which would construct a substantial facility and guarantee a significant number of new jobs.

Another indicator of the intent of the Denver City Council in enacting Ordinance No. 75 is the preamble to the August, 1991 Amendments. Under Colorado law, although "a subsequent legislative pronouncement of intent is not a part of the legislative history, such statements may be considered in construing the statute in question." *BQP Industries, Inc. v. State Bd. of Equalization of the State of Colo.*, 694 P.2d 337, 344 (Colo. App., 1984)

(citations omitted). Much like the case before the Court now, the court in *BQP Industries* was concerned with a subsequently amended statute:

> Here, the same General Assembly that passed the original statute subsequently stated in a resolution that it was intended to permit depreciation annually from the base year to the date of assessment and that the resolution was passed because the statutory provisions were being interpreted and administered contrary to that intent. Senate Joint Resolution No. 2, 51st General Assembly, Second Extraordinary Session.
>
> In 1980 the General Assembly amended § 39-1-104(9), C.R.S. (1977 Cum. Supp.) to mandate plainly, clearly, and unambiguously that depreciation be allowed annually from the base year to the date of assessment on personal business property. Colo. Sess. Laws 1980, ch. 155, at 714. Such legislation clarifying the intent of an earlier statute is entitled to great weight in statutory construction. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

BQP Industries, 694 P.2d at 344-345.[4]

The Court finds that the August 1991 enactments and discussion of intent are relevant and entitled to weight in determining the Denver City Council's intent in passing

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[4] In *BQP Industries* the Court was concerned with imposing a tax obligation on an individual. In that context, a statute is to be construed strictly in favor of the taxpayer. *BQP Industries*, 694 P.2d at 345. Again, in construing a statute which grants an exemption, the burden of proof is on the taxpayer and the statute is to be strictly construed against granting the exemption.

Ordinance No. 75. Without instantly deciding the retroactive application of these ordinances, the Court concludes that the preamble to Ordinance No. 568 serves to further clarify the intent of Ordinance No. 75.

Again, the Court is persuaded that Ordinance No. 75 was enacted to address the single structure contemplated by the proposed United Airlines Maintenance Facility, not the aggregation of multiple buildings of existing utilities.

The Court concludes that the joining of Continental's multiple buildings at Stapleton Airport does not meet the "facility" requirements of Ordinance No. 75 or Ordinance No. 568 and therefore, Continental did not qualify for the local use tax exemption allowed by the subject ordinances. To do so, would be to read the ordinances too broadly and in contravention of the Denver City Council's intent.

2. OTHER REQUIREMENTS OF ORDINANCE NO. 75

The Court also concludes that Continental has failed to fulfill the other requirements of Ordinance No. 75, in particular the requirement that the facility contain one million square feet of useable floor space. Regardless of whether facility means a single structure or multiple structures, the Court concludes that the portion of space leased by Continental that is then subleased to others should be excluded from the calculation to determine if the 1,000,000 square foot space requirement is met.

Continental argued and the Bankruptcy Court agreed that as long as Continental was obligated under leases for

one million square feet of space within the designated area they fulfilled the square footage requirement of Ordinance No. 75. According to Continental, it should be permitted to aggregate all space it leases and is thus "responsible for," regardless of whether it actually occupies the space. The Court agrees that Continental may include any space for which it is "responsible", however, Continental cannot include in the calculation space it has subleased to others. (e.g. 45,894 square feet leased by Chelsea Catering Corporation (D.I. 9, tab 6, pp. 148-149)). The Court finds that Continental is no longer "responsible" for such subleased space within the meaning of Ordinance No. 75. The Court finds that space subleased by Continental to others should be deducted for three reasons. First, Continental is not responsible for the operation and maintenance of such space. Second, there is no potential for sales of personalty that would qualify for the tax exemption within the subleased area. Third, no Continental employees could report for duty in such space. Unlike unused space that Continental could eventually use in its operations, square footage that has been subleased no longer can be occupied for purposes of using, consuming, storing or distributing personalty. For these reasons, the Court finds such space should be excluded from consideration in calculating the total square footage requirements of the ordinance.

When the square footage of the subleased area is deducted from the total amount of leased space, Continental falls below the one million square footage requirement. Falling short of the minimum square footage

requirement, Continental is not entitled to claim the exemption.[5]

3. Procedural Default of Continental

Even if the Court were to hold that multiple pre-existing structures could be considered a facility within the context of the ordinance, the Court concludes Continental would still be unable to avail itself of the exemption. Ordinance No. 75 is explicit in terms of the timing for requesting a refund. In order to be eligible for a refund, Continental must have requested it within sixty days. Continental failed to request a refund for February and March 1991 within that time frame. Thus, the Court concludes that Continental is unable to obtain a refund *or a credit* for those months. While the Bankruptcy Court placed significant weight on an apparent difference between a credit and a refund the Court is unable to discern any significant difference. The effect of granting a tax credit or a refund in the context of the subject use tax exemption is identical. Under either the credit or refund theory, the practical result is that the use tax Continental paid would be returned to it in a short period of time. Thus, the Court concludes that the time for requesting a

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[5] When this area is excluded from the calculation the total useable area falls below one million square feet. According to testimony, if only the unused space (42,913.06 square feet) were deducted from the total leased space then the total square footage would be under 1,000,000 square feet. Therefore, it follows, that if only the subleased space (45,894 square feet) were to be deducted from the total, the total useable floor space would also necessarily be below the required 1,000,000 square feet.

refund under Ordinance No. 75 is equally applicable to a request for a credit and subject to the sixty day period provided in the ordinance.

Further, Continental failed to supply the documentation required when requesting a refund. To later submit amended tax returns that are not authorized within the statutory framework in an effort to obtain a refund is an empty act. The ordinance explicitly requires the party seeking a refund to submit original invoices. Continental failed to supply these. Regardless of whether Continental was entitled to a refund, they failed to comply with the statutory requirements for obtaining a refund. Thus, they are not entitled to a refund or credit for taxes paid in any of the relevant three months.

Although the Court does not find their non-compliance with the statutory framework to create a jurisdictional bar to the Bankruptcy Court hearing and deciding this matter, the Court does conclude that the non-compliance by Continental with the provisions of the ordinance does act as a bar to any refund or credit. The requirements of the statute are explicit and Continental failed to comply with the procedural requirements in requesting a refund even if one were available to them under Ordinance No. 75.

C. RESERVE ACCOUNT REQUIREMENT

The reserve account requirement has concededly not been complied with by Continental. Continental argues that because they have been in operation for more than three years it need not comply with this requirement and,

further, that even if it had to comply with the requirement it would have been unable to segregate the necessary funds because they were a debtor in bankruptcy. The Court is unpersuaded.

With respect to whether Continental could have segregated the funds while in bankruptcy, the Court concludes that is not a determination for the debtor, in its discretion, to make.

In any event, the Court is persuaded that any reading of the reserve account requirement hinders Continental's position. If the Court reads the reserve account requirement as Continental suggests (that it only applies to new operations) then that lends credence to the argument of Denver that the statute was only intended to encompass a new facility. *See, supra.* However, if the Court reads the reserve account requirement to apply to all operations then a fair reading would be that any facility claiming the exemption must comply with the requirement for the first two years, which Continental admittedly did not do. Since the burden remains on the taxpayer when claiming a tax exemption, the Court concludes that Continental has been unable to meet this burden by its failure to comply with the applicable reserve account requirement.

VI. CONCLUSION

For the reasons discussed, the Court concludes Continental does not qualify for the local tax exemption created by the enactment of Ordinance No. 75 by the Denver City Council.

Thus, the Court will reverse the Order of the Bankruptcy Court dated February 4, 1992.

An order consistent with this Opinion will be entered.

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In the Matter of	:	Case Nos. 90-932
CONTINENTAL AIRLINES, INC., et al.,	:	through 90-984
Debtors.	:	

MEMORANDUM OPINION AND ORDER

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February 4, 1992

MEMORANDUM OPINION AND ORDER

HELEN S. BALICK, Bankruptcy Judge.

The Manager of Revenue for the City and County of Denver (Denver or Manager) has brought this motion for payment of an administrative expense claim for unpaid use tax, penalties and interest. 11 U.S.C. §§ 503(a), (b)(1)(B)(i) and (C). Continental Airlines, Inc. opposes payment of the administrative claim on the grounds that Continental is entitled to an exemption for the period at issue. Den.Rev.Mun.C. § 53-97(17); 11 U.S.C. § 505(a)(1). Continental has cross-moved for a refund or credit for taxes already paid while the exemption was in effect. 11 U.S.C. § 505(a)(2)(B)(ii). This is a core proceeding under sections 157(b)(2)(B) and (C) of Title 28.

For the reasons that follow Denver's motion is denied and Continental's cross-motion is granted.

I. *Background*

Continental operates a large commercial airline hub at Stapleton International Airport, approximately 15 miles north of Denver, Colorado. Continental leases more than one million square feet and employs more that 6,000 people at Stapleton. Among the buildings and areas occupied are airplane hangars, terminal concourses, ticket counters and office space.

Continental purchases supplies such as aviation fuel, spare parts, and tools to operate its hub. Most of the parts and tools come from out-of-state suppliers. Denver has

enacted use tax ordinances applicable to purchases of personal property (including airline fuel, parts and tools) out-of-state for use in-state. Den.Rev.Mun.C. § 53-96. Unlike sales tax, which is collected by the seller, the buyer must file a use tax return on the 20th of each month for purchases made the preceding month. Den.Rev.Mun.C. § 53-98(i).

In early 1991 the Denver council enacted an exemption to the use tax ordinance. The ordinance exempted sales of personalty "to be used, consumed, stored, or distributed at a facility . . . (b) that contains at least one million square feet of useable floor space and (c) that serves as a . . . regular place of reporting for duty for at least two thousand employees." Denver Ordinance No. 75, Series of 1991, effective February 1, 1991, Den.Rev.Mun.C. § 53-97(17) (the February exemption or Ordinance No. 75). (A parallel provision, not relevant here, was enacted for sales tax.)

Continental filed its use tax return as usual until June of 1991 when it determined it was entitled to the February exemption and began withholding the tax. Den.Rev.Mun.C. § 53-49. The exemption was claimed for the period May 1-August 8, 1991, when the February exemption was repealed and replaced with an amended exemption. Ordinance No. 568, §§ 1-4, Series of 1991, (effective August 9, 1991), Den.Rev.Mun.C. § 53-97(16) (revised) (August amendment or Ordinance No. 568). The parties agree Continental is not entitled to the exemption after August 9, 1991.

The partial payment of the use tax during the period the February exemption was in effect has effected a procedural bifurcation of the tax issue, though the underlying issue of entitlement to the exemption remains the same. The Manager of Revenue has assessed Continental $1,494,194.00 for the period the disputed tax was withheld, plus additional penalties and interest ($190,680.25 as of 9/21/91). Continental has filed for a credit or refund of the tax it believes it has mistakenly paid.

On July 19 Continental filed a Claim for Refund of the March and April overpayments in the amount of $795,137.13. Den.Rev.Mun.C. § 53-111. The Claim for Refund was denied by the Denver Department of Revenue. Continental also filed amended returns for the months of February, March and April on July 19, September 4 and September 27, 1991, respectively. An affirmative finding for Continental on the amended returns would result in a credit (not a refund) to the estate in the amount of $1,259,271.58. Continental has preserved its right of appeal to the Denver District Court from the Department of Revenue's final assessment for the period May 1-August 8, 1991. Den.Rev.Mun.C. § 53-124.

The Manager filed its motion for payment of an administrative expense in this court on August 16, 1991, based on its final assessment of the May and June use taxes owed. An amended motion covering all unpaid use taxes (plus penalties and accruing interest) was filed October 4, 1991. Continental filed its opposition and cross-motion for a determination of use tax overpaid for the period February 1-April 30, 1991. A hearing was held October 24, 1991.

II. *Jurisdiction*

[1] The first issue the court must resolve is whether it has jurisdiction to determine the amount of Continental's tax liability and right to a refund. Just as the analysis of Continental's tax liability or entitlement to a refund is procedurally distinct under Denver law, the jurisdictional analysis under the Bankruptcy Code also varies with the claim. Both sides wish a determination of Continental's tax liability for the period May 1-August 8, 1991. 11 U.S.C. § 505(a)(1). Continental alone argues that this court's jurisdiction extends to a determination of the estate's right to a refund for the period February 1-April 30, 1991 as well. 11 U.S.C. § 505(a)(2)(B).

The Bankruptcy Code provides a broad grant of authority to determine tax liability:

> § 505. Determination of tax liability.
>
> (a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

"[S]ection [505(a)] contemplates the normal situation where a tax liability issue arises with respect to a debtor." *Quatrone Accountants, Inc. v. I.R.S.*, 895 F.2d 921, 925 (3d Cir.1990) (finding jurisdiction even though third party sought determination of debtor's tax liability). The section is interpreted broadly; "the parameters of a bankruptcy court's jurisdiction over the subject matter of federal and state income taxation under 11 U.S.C.

§ 505(a)(1) corresponds with general principles governing a bankruptcy court's power to adjudicate at least core matters under 28 U.S.C. § 157." *Unsecured Creditors' Committee of Goldblatt Bros., Inc. v. I.R.S. (In re Goldblatt Bros., Inc.)*, 106 B.R. 522, 529 (Bankr. N.D.Ill.1989). *See also Michigan Employment Security Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1138 (6th Cir. 1991) (bankruptcy courts have jurisdiction to determine the amount and legality of unemployment compensation taxes incurred by debtors).

The broad grant of jurisdiction to determine the debtor's tax liability is only withdrawn if there has been a prior adjudication of the tax pre-petition by a court of competent jurisdiction. 11 U.S.C. § 505(a)(2)(A). Since the use tax dispute arose post-petition, this exception is not relevant. Therefore the court may determine the amount of Continental's tax liability.

Denver argues that the court must stop there. It contends that this court does not have jurisdiction because the refund was not "properly request[ed]" 11 U.S.C. § 505(a)(2)(B)(i). Among the arguments were whether Denver followed the mailbox rule, accepted facsimile signatures, or received the first claim on July 19, 20 or 21.

[2] There is a separate limit on the court's jurisdiction to determine the right of the estate to a refund:

(2) The court may not so determine –

* * *

(B) any right of the estate to a tax refund, before the earlier of –

(i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or

(ii) a determination by such governmental unit of such request.

11 U.S.C. § 505(a)(2)(B). One of the alternate preconditions must be satisfied before the bankruptcy court may take jurisdiction over refunds. The section mandates wise use of judicial resources: if the governmental unit were to grant a refund, the determination by the bankruptcy court would be unnecessary. The sections are in the alternative; proper filing is irrelevant to the latter provision.

The court finds that proper filing of a claim for refund is only relevant to this court's jurisdiction under section 505(a)(2)(B)(i). Since Denver has already denied Continental's claim, the court may take jurisdiction to determine the amount of refund under section 505(a)(2)(B)(ii).

[3] Having found that this court may take jurisdiction, the question remains whether it should. One of the few courts to address the issue of when the bankruptcy court should exercise its jurisdiction under section 505(a) provided a framework for the analysis:

> The analysis necessarily includes balancing the Bankruptcy Court's need to administer the bankruptcy case in an orderly and efficient manner, the complexity of the tax issues to be decided, the asset and liability structure of the debtor, the length of time required for trial and decision, judicial economy and efficiently, the

> burden on the Bankruptcy Court's docket, prejudice to the debtor and potential prejudice to the taxing authority responsible for collection from inconsistent assessments.

In re Hunt, 95 B.R. 442, 445 (Bankr. N.D.Tex.1989).

One of the overwhelming points in favor of taking jurisdiction is that there has already been a full trial in this court, whereas the Debtor's petition for refund and exemption claim are slowly making their way through the Denver administrative appeals process (which itself is the subject of litigation). Both sides welcomed the relative speed in which the issue could be resolved here. Accordingly, a substantial amount of time and effort has been devoted to this proceeding.

As to the complexity of the tax issues involved, they are relatively slight. In all likelihood the outcome will turn on the definition of "facility" under Colorado law. A bankruptcy judge is accustomed to applying state law under many sections of the Code. *See, e.g.*, 11 U.S.C. §§ 541(c)(2); 546(b).

The potential prejudice to the taxing authority is not great, considering that the February exemptions were only in effect six months and would not apply to many other taxpayers (if any). Therefore, there is little risk of inconsistent results.

Finally, judicial economy and efficiency dictates prompt resolution of this matter which has already been tried. If the court did not have jurisdiction over the refund as well, the result may well have been different. But considering all the facts and circumstances of these motions, the court will exercise its discretion to take

jurisdiction to determine the legality and amount of Denver's tax claim, and the estate's right to a refund.

III. *The Denver Ordinances*

Since the court has taken jurisdiction, it must now decide whether Continental qualifies for the February exemption to the Denver use tax, and if it does, whether the August amendment changes that result. Denver argues first that the statute must be narrowly construed against the taxpayer. Second, the common meaning of facility is a single building. Finally, even if Continental appeared to qualify for the February exemption, the August amendment clarified who was entitled to claim the exemption, leaving Continental out. Continental replies that it has met its burden of showing its operation at Stapleton qualifies for the exemption, and the August amendment does not change that result. To the extent the later bill attempts to take away the exemption from those who originally qualified, it is unconstitutional. The court agrees that Continental has met its burden of proof on the exemption and that subsequent retroactive "clarification" is not controlling over the plain language of the original February enactment.

A. *The February Exemption*

[4] The original ordinance exempted:

> Sales of tangible personal property to a transportation utility to be used, consumed, stored, or distributed at a facility –
>
> (a) located within an enterprise zone in the city designated as such pursuant to state law

> (b) that contains at least one million (1,000,000) square feet of useable floor space and
>
> (c) that serves as a headquarters or regular place of reporting for duty for at least two thousand (2,000) employees in the third year of operations of the facility and continually thereafter.

Denver Ordinance No. 75, Series of 1991, effective February 1, 1991, Den.Rev.Mun.C. § 53-97(17) (the February exemption or Ordinance No. 75).

The parties have stipulated to the following relevant facts. Continental is a "transportation utility." Stapleton is located in an "enterprise zone." Denver announced in its opening statement that it would stipulate to the fact that Continental leases one million square feet or more of usable floor space at Stapleton but if the footage that is not actually utilized by Continental (whether because it is occupied by a sublease or simply vacant) is subtracted the area falls below one million square feet. Transcript of Proceedings, p. 108 at lines 4-18 (Oct. 24, 1991). Finally, Continental has two thousand or more (on the order of six thousand) employees who report to work at Stapleton, but not to a single building.

Basically the key to construction of the February exemption is the term "facility." If it can only refer to a single building then the square footage and employee reporting requirements must be satisfied by a single structure. On the other hand, if "facility" means a group of buildings, then the square footage and employees may be summed over all buildings that comprise the facility.

Denver argues that the term "facility" means a single enclosed building, and that the town council only

intended to provide the exemptions to *new* facilities such as the one under construction by United Airlines at the new Denver airport. Since Continental does not have a single enclosed 1 million square foot building to which 2,000 or more employees report (Stipulation of Facts, No. 4), it does not qualify for the exemption. Continental replies that "facility" normally includes one or more buildings. It qualifies under the plain language of the exemption and additional qualifications should not be read into the statute.

[5] A statute granting a tax exemption is subject to special rules of statutory construction. The exemption is strictly construed against the taxpayer. *Atlantic Coast Line Railroad Co. v. Phillips,* 332 U.S. 168, 172, 67 S.Ct. 1584, 1586, 91 L.Ed. 1977 (1947); *Denver Center for the Performing Arts v. Briggs,* 696 P.2d 299, 308 (Colo.1985). The taxpayer bears the burden of proof that it qualifies by clear and convincing evidence. Den.Rev.Mun.C. § 53-11.

[6] The starting point for construction of Ordinance No. 75 is the recognition that Denver is a home rule municipality organized under the Colorado constitution. As such, local ordinances "supersede within the territorial limits and other jurisdictions of such city or town any law of the state in conflict therewith." Colo. Const., art. XX, § 6. Denver sales and use tax provisions supersede conflicting state tax statutes. *Security Life v. Temple,* 177 Colo. 14, 492 P.2d 63 (1972). Of course, the local ordinance must still comport with Colorado constitutional requirements. *Cherry Hills Farms v. City of Cherry Hills,* 670 P.2d 779 (Colo.1983).

Controlling Colorado law requires that the court "first look to the language of the statute." *City of Littleton v. County Com'rs*, 787 P.2d 158, 161 (Colo.1990) (citation omitted). "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." Colo.Rev.Stat.Ann. § 2-4-101 (1991). Only if the statutory language is ambiguous does the court consider the legislature's intent and purpose, as expressed through the legislative history, preamble and bill title. *City of Littleton*, 787 P.2d at 161.

The Denver chapter governing use and sales tax does not define facility. Denver has helpfully cited Webster's definition of facility for the court: "something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or to serve a particular purpose." *Webster's Third New International Dictionary*, unabridged, p. 812-13 (1981). As Continental points out, the example given, hospital, is often comprised of a number of buildings. The essence of the definition is collection of objects assembled for a purpose; the common purpose unites the pieces. The facility consists of whatever it takes to accomplish the purpose for which the facility exists.

It would appear that Continental's facility at Stapleton consisting of hangars, warehouse, cargo buildings, terminal concourses, ticket counters and office space all relate to its operation as a transportation utility. Employees report to various areas throughout the facility, and all are engaged in effecting the smooth operation of the airline at Stapleton.

This definition comports with that given in the Colorado tax statute that governs enterprise zones:

> "Facility" means any factory, mill, plant, refinery, warehouse, feedlot, building or *complex of buildings* located within the state, including the land on which such facility is located and all machinery, equipment, and other real and tangible personal property located at or within such facility *and used in connection with the operation of* such facility.

Colo.Rev.Stat. § 39-22-508.2(2)(a) (emphasis added)

Although not controlling, the state definition provides guidance in the absence of a definition in the Denver Code. As with Webster's definition, the touchstone is the *use* in connection with the operation of the facility.

[7] A major airport hub, operated for the purpose of transporting passengers and cargo, naturally consists of multiple buildings and areas, all of which are necessary to the operation of the facility. As discussed in the Background, Continental leases counter space, concourses, warehouses and a flight kitchen, among other buildings. In the absence of a controlling definition in the Denver Revised Municipal Code, the court must rely on the common meaning. Colo.Rev.Stat.Ann. § 2-4-101 (1991). In common usage, the term "facility" as applied to a "transportation utility," or major airport hub, would include all the areas of activity at the airport which are used in connection with operating the airline. Therefore the square footage of all the leased areas may be summed, and the fact that Continental's six thousand employees report to multiple areas at Stapleton is irrelevant.

Denver argues that the total area Continental leases does not "contain" at least one million square feet because some of the area is vacant, and other areas are subleased. Forty-six thousand square feet leased by Continental is occupied by its in-flight food service subsidiary Chelsea Catering Corporation. The fact that Chelsea has been set up as a separate entity is not relevant when it is Continental who leases the space and pays the bills. Similarly, the fact that forty-three thousand square feet in terminal and concourse D are empty is irrelevant to whether or not Continental's Stapleton facility "contains" one million square feet of usable floor space. The only sensible meaning of "contain" in this context is lease rather than physically occupy every square foot.

Since Denver stipulated to the lease of at least one million square feet of usable floor space, and the court rejects Denver's contention that the empty areas and the area occupied by Chelsea must be discounted in calculating total area. Continental has met its burden of proof that is facility contains at least one million square feet of useable floor space. Denver has also stipulated that Stapleton is a defined "enterprise zone" and that Continental has at least two thousand employees who report to work at Stapleton. Therefore, Continental has met its burden of proof on all requirements in Ordinance No. 75; it is entitled to claim the February exemption. The question remains whether the August amendments change that result.

B. *The August Amendments*

[8] On August 9, 1991, the February exemptions were repealed and new exemptions passed in their place.

> (16) Sales of machinery, tools, and equipment, including replacement parts, to a transportation utility to be used in the operation of an equipment maintenance facility and at an industrial building –
>
> > (a) that is located in the city within an enterprise zone designated as such pursuant to state law;
> >
> > (b) that contains at least one million (1,000,000) square feet of enclosed, useable [sic] floor space on a single level;
> >
> > (c) that serves as a regular place of work and as a regular place for reporting for duty for at least two thousand (2,000) employees of the utility in the third year of operations of the maintenance facility and continually thereafter; and
> >
> > (d) that is operated by an interstate carrier for hire primarily for maintaining, rebuilding, or repairing equipment moving in interstate commerce.

Ordinance No. 568, §§ 1-4, Series of 1991, (effective August 9, 1991), Den.Rev.Mun.C. § 53-97(16) (revised) (August amendment or Ordinance No. 568). Section 4 of the new bill makes the amended use tax exemption retroactive to February 1, 1991. The parties agree Continental does not qualify for the use tax exemption after August 9. They disagree on what retroactive effect the August

amendment has on the February exemption before August 9, 1991.

The Colorado Bill of Rights does not permit retroactive legislation: "No *ex post facto* law, nor law . . . retrospective in its operation, . . . shall be passed by the general assembly." Colo. Const., art. II, § 11. "[A] retrospective law embraces a statute which abrogates an existing right of action or defense, or creates a new obligation on transactions or considerations already past." *California Co. v. Colorado,* 141 Colo. 288, 348 P.2d 382, 399 (1959) citations omitted, *app. dismissed,* 364 U.S. 285, 81 S.Ct. 42, 5 L.Ed.2d 37 (1960). This rule is applied in tax cases as well: "[a] very serious question of constitutionality would arise if the revenue measure was construed to mean that it worked retrospectively." *Id.*

However, the Colorado Supreme Court has upheld the constitutionality of a state tax statute retroactively varying the method of property valuation for tax purposes. *Martin v. Board of Assessment Appeals,* 707 P.2d 348 (Colo.1985). "[P]roperty owners have no vested right to have their taxable property assessed by particular methods employed in prior years." *Id.* at 352 (citing *American Refrigerator Transit Co. v. Adams,* 28 Colo. 119, 63 P. 410 (1900) in which the Colorado Supreme Court upheld a new tax valuation method for already taxable railroad cars). "Since the statute only alters the factors which may be considered in determining actual value, it does not impair the taxpayers' vested rights, and therefore is not unconstitutionally retrospective in its operation." *Id.*

A statute is applied retroactively if it "takes away or impairs vested rights acquired under existing law, or

creates a new obligation, imposes a new duty, or attaches a new disability, with respect to transactions . . . already past." *Van Sickle v. Boyes*, 797 P.2d 1267, 1270-71 (Colo.1990). The court agrees with the debtor that the attempt to retroactively repeal the exemption would "attach a new disability [the use tax] with respect to transactions already past" [the out-of-state purchase of personalty for use in Denver].

The bill repealing the February exemption and enacting the August amendments contained a preamble, also in dispute:

> WHEREAS, the Council, by enacting [Ordinance No. 568] into law expresses and reaffirms its understanding that no facility, building, or enclosed structure or group of such facilities, buildings, or enclosed structures currently, as of the date of this enactment, and at all times prior thereto meets the eligibility criteria established for the exemptions granted by Ordinance No. 75, Series of 1991. . . .

Basically the preamble is a retrospective statement of legislative intent. But legislative intent is only relevant to the extent the plain language or the Ordinance is unclear or ambiguous. *City of Littleton*, 787 P.2d at 161. Since the court has interpreted the plain language of the February exemption by the common meaning rule, resort to legislative intent is unnecessary.

[9] Denver argues that the August amendment is not a retroactive bill so much as a retroactive *clarification* of past bills. In fact the title of the August amendment makes this clear:

> A bill for an ordinance repealing Ordinance No. 75, Series of 1991, and reenacting subsections (16) and (17) of Section 53-97 of the Revised Municipal Code *in order to clarify the exemption* from the use tax relating to maintenance facilities located in enterprise zones.

However, the Denver Revised Municipal Code provides "the headings and catchlines are intended as mere catchwords to indicate the content of sections, and shall not be deemed or taken to be a part of the sections in any substantive sense whatever." Tit. II, § 1-4. Under Colorado State law the title, like the preamble of a bill, is only relevant in the event the legislative intent cannot be gleaned from the plain language of the bill. *City of Littleton*, 787 P.2d at 161. Such is not the case with the Ordinances before the court.

C. *Continental's Right to a Refund*

[10] The final issue is whether Continental is entitled to a refund or credit of overpaid use tax for February, March and April. At the outset, Continental concedes that its March Claim for Refund was filed one month late and a Claim for Refund was never filed for February overpayment. The most Continental requests is a determination that it is entitled to a credit for February and March (and a refund of the April overpayments).

As discussed in Part I., Denver objects to the Claims for Refund on both procedural and substantive grounds. The court has found against Denver on the substantive issue – whether Continental is entitled to claim the February Exemption. Also, the court found that procedural deficiencies were irrelevant in deciding whether this

court has jurisdiction over the claims for refund under section 505(a)(2)(B)(ii). However, now that the court must determine Debtor's entitlement to a refund under the Denver Revised Municipal Code, procedural deficiencies are relevant.

Under the Denver use tax article "[a]pplications for refund must be made within sixty [] days after the purchase of the goods or the performance of the services on which the exemption is claimed." Den.Rev.Mun.Co. § 53-111(b). Since the sixty days would apparently run from the date the use tax return is due, the only claim for refund to be timely filed is the April claim filed July 19, 1991. Continental is entitled to a refund of the April use tax, but to a credit only for the February and March use tax, for which it has filed amended tax returns.

An order in accordance with the Memorandum Opinion is attached.

ORDER

AND NOW, February 4, 1992, for the reasons stated in the attached Memorandum Opinion,

IT IS ORDERED THAT:

1. The motion of the Manager of Revenue for the City and County of Denver is DENIED.

2. Continental Airlines, Inc's motion for a refund or credit is GRANTED.

3. The Manager of Revenue is ordered to compute Continental's tax credit for February and March and the amount of refund for April, with interest to accrue from the date of this Order.

APPENDIX E

EXHIBIT D

BY AUTHORITY

ORDINANCE NO. 74 COUNCIL BILL NO. 48

SERIES OF 1991 COMMITTEE OF REFERENCE:

ECONOMIC & CULTURAL DEVELOPMENT

A BILL

FOR AN ORDINANCE AMENDING SECTION 53-297 OF THE REVISED MUNICIPAL CODE TO CREATE AN EXEMPTION FROM THE BUSINESS OCCUPATIONAL PRIVILEGE TAX

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

SECTION 1. That section 53-297 of the Revised Municipal Code be amended by the addition of a new subsection (a)(4) to read as follows:

(a)(4) Any transportation utility that –

(a) erects and maintains within an enterprise zone in the city designated as such pursuant to state law a structure containing at least one million (1,000,000) square feet of useable floor space and

(b) employs at such structure at least 2,000 employees in its third year of operations and continually thereafter.

This exemption may be applicable to the first and second years of operations at the facility provided that

the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

PASSED BY THE COUNCIL January 28, 1991

/s/ Cathy Donahue – PRESIDENT

APPROVED: /s/ Federico Peña – MAYOR Jan 29 1991

ATTEST: /s/ Felicia Muftic – CLERK AND RECORDER EX-OFFICIO CLERK OF THE CITY AND COUNTY OF DENVER

PUBLISHED IN The Daily Journal Jan. 25, 1991 and Feb. 1, 1991

PREPARED BY: Donald E. Wilson, Asst. City Attorney 1991

REVIEWED BY: /s/ Patricia Wells, CITY ATTORNEY 1/17 1991

SPONSORED BY COUNCIL MEMBER(S): _____

APPENDIX F

BY AUTHORITY

ORDINANCE NO. 75 COUNCIL BILL NO. 49

SERIES OF 1991 COMMITTEE OF REFERENCE:

ECONOMIC & CULTURAL DEVELOPMENT

A BILL

FOR AN ORDINANCE AMENDING SECTION 53-97 OF THE REVISED MUNICIPAL CODE TO CREATE ADDITIONAL EXEMPTIONS FROM THE USE TAX

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

SECTION 1. That section 53-97 of the Revised Municipal Code be amended by the addition of a new subsection (16) to read as follows:

(16) Sales of construction and building materials for use in the construction, reconstruction, or remodeling of a new facility of a transportation utility –

(a) located within an enterprise zone in the city designated as such pursuant to state law

(b) that is designed to contain at least one million (1,000,000) square feet of useable floor space and

(c) that serves as a headquarters or regular place of reporting for duty for at least two thousand (2,000) employees in the third year of operations of the facility and continually thereafter.

This exemption may be applicable to the design and construction phases of the new facility and to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

SECTION 2. That Section 53-97 of the Revised Municipal Code be and hereby is amended by the addition of a new subsection (17) to read as follows:

(17) Sales of tangible personal property to a transportation utility to be used, consumed, stored, or distributed at a facility –

(a) located within an enterprise zone in the city designated as such pursuant to state law

(b) that contains at least one million (1,000,000) square feet of useable floor space and

(c) that serves as a headquarters or regular place of reporting for duty for at least two thousand (2,000) employees in the third year of operations of the facility and continually thereafter.

This exemption may be applicable to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

PASSED BY THE COUNCIL January 28, 1991

/s/ Cathy Donahue – PRESIDENT

APPROVED: /s/ Federico Peña – MAYOR Jan 29 1991

ATTEST: /s/ Felicia Muftic – CLERK AND RECORDER EX-OFFICIO CLERK OF THE CITY AND COUNTY OF DENVER

PUBLISHED IN The Daily Journal Jan. 25, 1991 and Feb. 1, 1991

PREPARED BY: Donald E. Wilson, Asst. City Attorney _____1991

REVIEWED BY: /s/ Patricia Wells, CITY ATTORNEY 1/17 1991

SPONSORED BY COUNCIL MEMBER(S): _____

(seal)

APPENDIX G

BY AUTHORITY

ORDINANCE NO. 568 COUNCIL BILL NO. 566

SERIES OF 1991 COMMITTEE OF REFERENCE: AIRPORT

A BILL

FOR AN ORDINANCE REPEALING ORDINANCE NO. 75, SERIES OF 1991, AND REENACTING SUBSECTIONS (16) AND (17) OF SECTION 53-97 OF THE REVISED MUNICIPAL CODE IN ORDER TO CLARIFY THE EXEMPTION FROM THE USE TAX RELATING TO MAINTENANCE FACILITIES LOCATED WITHIN ENTERPRISE ZONES.

WHEREAS, by authority of Ordinance No. 75, Series of 1991, effective February 1, 1991, the City Use Tax Article of the Revised Municipal Code was amended to add Subsections (16) and (17) to Section 53-97 of the Code to exempt from the tax certain uses by a transportation utility of tangible personal property in connection with the construction and operation of a new maintenance facility that would contain at least one million square feet of useable floor space and serve as a regular place of employment for at least two thousand employees; and

WHEREAS, it was at the time of the introduction, passage, and enactment of Ordinance No. 75, Series of 1991, and is presently the intention of the Council that only a) uses of machinery, tools, and equipment in the operation of an equipment maintenance facility at a single industry building meeting the square footage and employment requirements and b) uses of building and

construction materials for use in the construction of a maintenance facility for a single industrial building containing such minimum floor space and employing such number of employees be exempted from the use tax in conjunction with the construction and use of a new, enclosed structure; and

WHEREAS, the Council, by enacting this bill into law expresses and reaffirms its understanding that no facility, building, or enclosed structure or group of such facilities, buildings, or enclosed structures currently, as of the date of this enactment, and at all times prior thereto meets the eligibility criteria established for the exemptions granted by Ordinance No. 75, Series of 1991, or by this ordinance, but that said Ordinance No. 75 was, and this ordinance is, intended to encourage a transportation utility to construct and operate such a maintenance facility in the City and County of Denver;

NOW, THEREFORE,

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

Section 1. That Ordinance No. 75, Series of 1991, be and is hereby repealed.

Section 2. That subsection (16) be added to Section 53-97 of the Revised Municipal Code relating to exemptions from the use tax reading and to read as follows:

(16) Sales of machinery, tools, and equipment, including replacement parts, to a transportation utility to be used in the operation of an equipment maintenance facility and at an industrial building –

(a) that is located in the city within an enterprise zone designated as such pursuant to state law;

(b) that contains at least one million (1,000,000) square feet of enclosed, useable floor space on a single level;

(c) that serves as a regular place of work and as a regular place for reporting for duty for at least two thousand (2,000) employees of the utility in the third year of operations of the maintenance facility and continually thereafter; and

(d) that is operated by an interstate carrier for hire primarily for maintaining, rebuilding, or repairing equipment moving in interstate commerce.

This exemption may be applicable to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

Section 3. That subsection (17) be added to section 53-97 of the Revised Municipal Code relating to exemptions from the use tax reading and to read as follows:

(17) Sales of construction and building materials for use in the construction, reconstruction, or remodeling of a new industrial building of a transportation utility used for an equipment maintenance facility –

(a) that is located in the city within an enterprise zone designated as such pursuant to state law in the city;

(b) that is designated to contain at least one million (1,000,000) square feet of enclosed, useable floor space on a single level;

(c) that serves as a regular place of work and as a regular place for reporting for duty for at least two thousand (2,000) employees in the third year of operations of the maintenance facility and continually thereafter; and

(d) that is operated by an interstate carrier for hire primarily for maintaining, rebuilding, or repairing equipment moving in interstate commerce.

This exemption may be applicable to the design and construction phases of the new facility and to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

Section 4. Sections 2 and 3 of this ordinance shall take effect February 1, 1991.

PASSED BY THE COUNCIL August 5, 1991

/s/ Ramona Martinez – PRESIDENT

APPROVED: /s/ Wellington E. Webb – MAYOR 8/6 1991

ATTEST: /s/ Arie P. Taylor – CLERK AND RECORDER EX-OFFICIO CLERK OF THE CITY AND COUNTY OF DENVER

PUBLISHED IN The Daily Journal Aug. 2, 1991 and Aug. 9, 1991

PREPARED BY: Donald E. Wilson, Asst. City Attorney
7/23/1991

REVIEWED BY: /s/ George J. Cerrone, Jr. Dep[uty]
CITY ATTORNEY 7/25/ 1991

SPONSORED BY COUNCIL MEMBER(S): _____

(seal)

APPENDIX H

BY AUTHORITY

ORDINANCE NO. 571 COUNCIL BILL NO. 569

SERIES OF 1991 COMMITTEE OF REFERENCE:

AIRPORT

A BILL

FOR AN ORDINANCE AMENDING SECTION 53-97 OF THE REVISED MUNICIPAL CODE RELATING TO EXEMPTIONS FROM THE USE TAX.

BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:

Section 1. That section 53-97 (also known and cited in the alternative as Section 97, Chapter 53) of the Revised Municipal Code relating to exemptions from the use tax imposed by the City Use Tax Article be and is amended hereby to read as follows:

Sec. 53-97. Exemptions.

There shall be exempt from taxation under the provisions of this article the following:

(1) All sales to the United States government, to the state, its departments and institutions, and the political subdivisions thereof only when purchased in their governmental capacities.

* * *

(16) Sales of machinery, tools, and equipment, including replacement parts, to a transportation utility to

be used by the utility in the operation of an equipment maintenance facility and at an industrial building –

(a) that is located in the city within an enterprise zone designated as such pursuant to state law;

(b) that contains at least one million (1,000,000) square feet of enclosed, useable floor space on a single level;

(c) that serves as a regular place of work and for reporting for duty for at least two thousand (2,000) employees in the third year of operations of the maintenance facility and continually thereafter; and

(d) that is operated by an interstate carrier for hire primarily for maintaining, rebuilding, or repairing equipment moving in interstate commerce.

This exemption may be applicable to the first and second years of operations at the industrial building provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

(17) Sales of construction and building materials for use in the construction, reconstruction, or remodeling of a new industrial building of a transportation utility to be used by the utility for an equipment maintenance facility –

(a) that is located in the city within an enterprise zone designated as such pursuant to state law;

(b) that is designed to contain at least one million (1,000,000) square feet of enclosed, useable floor space on a single level;

(c) that serves as a regular place of work and for reporting for duty for at least two thousand (2,000) employees in the third year of operations of the maintenance facility and continually thereafter; and

(d) that is operated by an interstate carrier for hire primarily for maintaining, rebuilding, or repairing equipment moving in interstate commerce.

This exemption may be applicable to the design and construction phases of the new facility and to the first and second years of operations at the facility provided that the utility establishes a reserve account for the tax for its return to the city at the end of the third year of operations should less than two thousand (2,000) employees be employed at the facility in said third year.

PASSED BY THE COUNCIL August 5, 1991

/s/ Ramona Martinez – PRESIDENT

APPROVED: /s/ Wellington E. Webb – MAYOR 8/6 1991

ATTEST: /s/ Arie P. Taylor – CLERK AND RECORDER, EX-OFFICIO CLERK OF THE CITY AND COUNTY OF DENVER

PUBLISHED IN THE DAILY JOURNAL Aug. 2, 1991
Aug. 9, 1991

PREPARED BY: DONALD E. WILSON, ASSISTANT CITY ATTORNEY 7/23/91

REVIEWED BY: /s/ George J. Cerrone, Jr. Dep[uty] CITY ATTORNEY 7/25 1991

SPONSORED BY COUNCIL MEMBER(S)_____

_____

_____

APPENDIX I

ARTICLE III. USE TAX*

DIVISION 1. GENERALLY

Sec. 53-91. Name of tax.

This article may be known and cited as the city use tax article.

(Ord. No. 667-81, § 1, 12-14-81)

Sec. 53-92. Legislative intent.

(a) It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that, for the purposes of this article, every person who stores, uses, distributes, or consumes in the city any article of tangible personal property or any service subject to the provisions of this article, purchased at retail, is exercising a taxable privilege.

(b) It is hereby declared to be the legislative intent of the city, acting through its duly elected representatives, that, for the purposes of this article, every vendor who is engaged in business in the city and who shall deliver or cause to be delivered to the purchaser in the city any property or service taxable herein, shall collect the tax imposed by this article upon the basis of an addition of the tax imposed by this article to the purchase price of such property or service that is purchased at any one time by every such purchaser, in the manner hereinafter set forth.

(c) [omitted]

* * *

Sec. 53-93. Purpose of tax.

The council declares that the purpose of the levy of the tax imposed by this article is for raising funds for the payment of expenses of operating and improving the city and its facilities and for the payment of the principal of and interest due upon any general obligation or special revenue bonds lawfully authorized and issued by and on behalf of the city; in accordance with this purpose, the proceeds of the tax shall be placed in the unapportioned sales, use and lodger's tax account of the fund plan, section 20-18 of the Code, from which shall be allocated, apportioned, and transferred as therein provided such sums to the respective funds and accounts of said fund plan as are therein indicated and for the purposes therein stated.

APPENDIX J

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
CONTINENTAL AIRLINES, INC., et al.	)	Case Nos. 90-932 through 90-984
Debtors.	)	

STIPULATION OF FACTS

Continental Airlines, Inc. and the Manager of Revenue of the City and County of Denver, Colorado, by counsel hereby stipulate and agree as follows:

1. To the admission of Denver, Colorado, Ordinance Nos. 41, 73, 74, 75, and 567 through 572, Series of 1991.

2. To the admission of Sections 53-91 through 53-138 (Use Tax Article) of the Denver Revised Municipal Code, as in effect January 31, 1991.

3. To the admission of C.R.S. §§ 39-30-101 to 39-30-109 (1990) (Enterprise Zone Act), and C.R.S. §§ 39-22-508.1 to 39-22-508.5 (1990) (Job Expansion & Investment Act).

4. That Continental Airlines, Inc. ("Continental") has no, and during the period from February 1, 1991 through August 8, 1991 had no, single building at Stapleton International Airport ("Stapleton"), in Denver, Colorado, that both contains one million (1,000,000)

square feet or more of useable floor space and to which two thousand (2,000) or more Continental employees report.

5. That Continental does not have, and did not have during the period from February 1, 1991 to August 8, 1991, a single building in an enterprise zone, in the City and County of Denver, that contains one million (1,000,000) square feet or more of useable floor space.

6. Continental has, and did have during the period from February 1, 1991 to August 8, 1991, 2,000 or more employees who report to and work at Stapleton.

7. Continental does not own in fee simple absolute any real property or buildings located within an enterprise zone in the City and County of Denver, Colorado, but instead holds only leasehold interests.

8. The Parties reserve their objections as to relevancy of these stipulated matters, and reserve the right to call any witnesses or present any exhibits they deem necessary on any material issue.

9. The buildings leased by Continental within the boundaries of Stapleton and the buildings at 4155 Forest

and 4771 Holly are located in an enterprise zone in the City and County of Denver, Colorado.

Morrison and Foerster

By: /s/ Francis A. Koncilja
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370 17th Street, Suite 5200
Denver, Colorado 80202
(303) 592-1500
Attorneys for Continental Airlines, Inc.

Daniel E. Muse
City Attorney of the City and County of Denver

By: /s/ Alice J. Fischer
Alice J. Fischer
Assistant City Attorney
353 City and County Building
Denver, Colorado 80202-5375
(303) 640-3611

DATED: October 22, 1991

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

IN RE: CONTINENTAL AIRLINES, INC., et al.,	:	
Debtors,	:	
v.	:	CIVIL ACTION
PATRICIA BEER, Manager of Revenue of the City And County of Denver, Colorado,	:	NO. 92-244 (JJF)
Appellant	:	
v.	:	
CONTINENTAL AIRLINES, INC., et al.,	:	
Appellees	:	

Wilmington, Delaware
October 22, 1992
10:10 o'clock, a.m.

BEFORE: HONORABLE JOSEPH J. FARNAN, JR., U.S.D.C.J.

Valerie J. Gunning
Official Court Reporter

[p. 36] * * *

[THE COURT:] Now, what I'm trying to get at is: Why did Continental pay? I'm sure this ordinance wasn't a secret out there, particularly since they were passing it probably in the real world for United. And I agree with the equal protection problems that you raised they might have had.

So Continental folks out there must have known about it. Why in the world did they pay if they really thought they were exempt? And it's not just a lawyers – or litigants make work position to now give them something to say in the course of litigation.

MS. KONCILJA: Your Honor, I don't know the answer to that question.

Continental did file the May use tax return on June 20th, which claimed the exemption. But you're correct, there was a window of time during which they were paying it. But they did not wait until matters were brought before the Bankruptcy Court to go back and file the others.

THE COURT: Well, there's not a precise time.

* * *

APPENDIX L

AS FILED WITH THE BANKRUPTCY COURT ON FEBRUARY 6, 1992

THIS IS NOT A SOLICITATION OF ACCEPTANCE OF THE JOINT PLAN. ACCEPTANCE MAY NOT BE SOLICITED UNTIL A DISCLOSURE STATEMENT HAS BEEN APPROVED BY THE BANKRUPTCY COURT. THIS DISCLOSURE STATEMENT HAS BEEN SUBMITTED FOR APPROVAL BUT HAS NOT YET BEEN APPROVED BY THE BANKRUPTCY COURT.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	:	Case Nos. 90-932 through 90-984
CONTINENTAL AIRLINES, INC., *et al.*,	:	Jointly Administered under Case No. 90-932
Debtors.	:	

DISCLOSURE STATEMENT
PURSUANT TO SECTION 1125 OF
THE BANKRUPTCY CODE
WITH RESPECT TO DEBTORS'
JOINT PLAN OF REORGANIZATION UNDER
CHAPTER 11 OF THE
UNITED STATES BANKRUPTCY CODE

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February 6, 1992

[p. 22] * * *

6. Facilities

In the last five years, CAL had made substantial expenditures on airport facilities, including the construction of a new, state-of-the-art 41-gate terminal at Newark, the completion of a 6-gate complex at Los Angeles Airport, and the construction of a substantially remodelled [sic] 23-gate terminal at Cleveland. CAL's airport terminal facilities in Houston include 28 gates that were constructed in 1981, and are substantially more attractive than other facilities at the airport and also include six gates in the adjacent new international terminal opened in 1990. Also, the Company has recently constructed

flight kitchens at Cleveland, Honolulu, Houston, Los Angeles and Newark.

CAL intends to construct a major new maintenance facility before 1995. The new facility is necessary in part to replace CAL's facilities at Denver, which are scheduled to close in early 1994. Management of NewCal expects the consolidation of certain of CAL's existing separate operations into a comprehensive maintenance base to result in significant savings in maintenance expense, primarily by reducing the amount of maintenance currently contracted to third parties. Although prior to the Debtors' Chapter 11 petition, the City of Houston had agreed to finance a maintenance base (not including an engine overhaul facility), the status of that commitment is uncertain and NewCal intends to solicit competing bids from other locations.

* * *

(2)

No. 93-1154

Supreme Court, U.S.
FILED
FEB 16 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

In re: CONTINENTAL AIRLINES, INC., *et al.*,

Debtors.

PATRICIA BEER, MANAGER OF REVENUE OF THE CITY AND COUNTY OF DENVER, COLORADO,

Petitioner,

v.

CONTINENTAL AIRLINES, INC., *et al.*,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 93-1154

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Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Continental Airlines, Inc. ("Continental" or "Respondent"), through the undersigned counsel, submits this Brief In Opposition to the Petition for Writ of Certiorari filed by the City and County of Denver ("Denver" or "Petitioner") to review the judgment of the United States Court of Appeals for the Third Circuit (the "Court of Appeals"). The Court of Appeals resolved the issue before it by applying controlling state law. Petitioner has

not alleged grounds which justify this Court exercising its discretion. The Writ should be denied.

Statement of Facts

This case arises from Petitioner's attempt to collect three months of use taxes from Continental Airlines pursuant to a city ordinance in effect for only six months and superseded more than two years ago. That ordinance used the word "facility" without providing a definition. The question of statutory interpretation decided by the Court of Appeals was whether the word "facility" was limited to one building, as Denver urges, or whether it included a complex of buildings, as dictionary and state law definitions provide.

The ordinance in question is an artifact of Petitioner's attempt to enact legislation that would enable Petitioner to offer a tax incentive to United Airlines while avoiding a state constitutional prohibition against special legislation. The issues raised by the Petition, which have already been addressed by three federal courts, are truly *sui generis*, are limited to questions of statutory construction under state law, and do not in any way implicate federal law or policy. Moreover, any state law question is moot because Petitioner has amended the ordinance to specifically define a qualifying facility. Thus, review by this Court is neither necessary nor warranted.

In February 1991, Denver enacted Municipal Ordinance No. 75 granting a limited exemption from Denver's use tax (Denver Revised Municipal Code § 53-92, Appendix I, at I1) for certain goods used at a facility owned by a

transportation utility which met certain criteria: location in an enterprise zone, at least one million square feet of usable floor space, and the regular place of reporting for at least 2,000 employees. *See* Appendix F at F2. (For an explanation of the relationship between sales and use tax in Denver's Municipal Code and the procedures for paying the tax, which is self assessed monthly, see the Court of Appeals decision, Appendix A, at A4-A7.)

The stimulus for the ordinance was Denver's desire to entice United Airlines to build a new maintenance facility in Denver. Appendix C at C26-C27. Because the state constitution prohibits special legislation, however, (*Colorado Constitution, Article II, Section 11*), Denver could not explicitly limit the proposed use tax exemption to United. Accordingly, Denver attempted to draft around the constitutional prohibition through the device of enacting legislation undoubtedly applying to United's proposed maintenance facility, but that also, to outward appearances, would apply equally to other taxpayers.

Although Denver's motivation may have been its desire to obtain a new maintenance facility, the language actually used in the ordinance originally enacted by Petitioner did not restrict the exemption either to new facilities or to maintenance facilities. Nor did it restrict the exemption to a facility consisting of a *single* building meeting certain square footage and employee reporting requirements. Rather, the ordinance as originally enacted, broadly provided that the exemption would be available for sales of tangible personal property "to a transportation utility to be used, consumed, stored or distributed at a facility" which was first "located within an enterprise zone"; second, "contains at least one million (1,000,000)

square feet of usable space" and third, that "serves as a headquarters or regular place of reporting for duty for at least two thousand (2,000) employees in the third year of operations of the facility and continually thereafter." (*See* Appendix F at F2.)

Continental met all of these requirements. Accordingly, on June 20, 1991, respondent Continental Airlines filed a local use tax return claiming entitlement to the exemption. Continental's claim was based on the fact that it was a transportation utility whose Colorado facility (which concededly consisted of several buildings) was located in an enterprise zone, contained at least one million square feet of usable floor space, and was home to at least 2,000 employees.

Within two months of receiving notice Continental was claiming the exemption, Denver repealed the original ordinance and enacted two new ordinances. These new ordinances substantially changed the criteria for claiming the use tax exemption.[1] No longer was it sufficient for a

---

[1] The council appears to have passed two new ordinances, rather than one, because of its desire both to eliminate retroactively the exemption granted by the original ordinance and to ensure that the modified eligibility criteria would apply prospectively. Thus, the first of the two new ordinances, which was styled a "clarification" of the original ordinance, (*See* Ord. No. 568 at Appendix G), repealed the original ordinance and ostensibly "clarified" the council's intention that the definition of a qualifying facility contained in the original ordinance (which did not contain the requirements that the facility be new, etc.) was actually intended to be the same as the definition of a qualifying facility contained in the new ordinance (which did contain the requirements that the facility be new, etc.) (*See* Ord. No. 571 at Appendix H.)

The second of the two new ordinances simply extended the new definition of a qualifying facility into the future. Because

transportation utility to have a facility in an enterprise zone that met the requisite square footage and employee reporting requirements. Now, the exemption was only applicable to a *new* facility having a *single building* with at least one million square feet of usable floor space on a single level and which was used primarily for maintaining equipment used in interstate transportation. (*See* Appendix G & H.) In addition, Denver changed other portions of the ordinance which further narrowed its application from tangible personal property to "sales of machinery, tools & equipment . . . " (*See* Appendix G at G2.) This appears to have been done to delete aviation fuel from the use tax exemption.

The new ordinances became effective on August 8, 1991. Prior to that date, Continental filed amended use tax returns seeking a refund of the use taxes it had paid for the three months between February 1, 1991 (when the original ordinance became effective) and May 1, 1991 (when Continental began claiming the exemption).

Following receipt of Continental's amended returns, Denver invoked the jurisdiction of the United States Bankruptcy Court for the District of Delaware and filed a motion seeking payment of the withheld taxes as an administrative expense pursuant to 11 U.S.C. § 503. Continental responded with a cross-motion requesting an

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Continental agrees that Denver had the power to change the scope of the exemption prospectively, and because Continental agrees that it did not qualify for the exemption under the revised eligibility criteria, the second new ordinance was not at issue below.

order first determining that it was eligible for the exemption under the original ordinance, and then requiring Denver to either refund the use taxes Continental had unnecessarily paid during the first three months the exemption was in effect or, in the alternative, grant Continental a credit for that amount.[2]

After providing the parties with an opportunity for discovery and briefing, the bankruptcy court held a hearing on the motion and cross-motion on October 24, 1991. The parties stipulated to most of the relevant facts (*See* Appendix J; Appendix D at D4; Appendix A at A12.) On the question of statutory interpretation, Denver's position was that the court should look at extrinsic evidence in the form of council resolutions, economic impact studies and the like in order to determine the meaning of the term "facility" in the original ordinance. (*See* Appendix A at A10.) According to Denver, the extrinsic evidence it sought to proffer demonstrated conclusively that the term "facility" in the original ordinance was intended to refer only to a single new building used primarily for maintenance that also satisfied the enterprise zone, square footage, and employee reporting requirements.

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[2] The question of whether the bankruptcy court had jurisdiction over Continental's refund claim under 11 U.S.C. § 503 was fully addressed below. The Court of Appeals ultimately concluded that jurisdiction was proper under § 503, but held that Continental was not entitled to a refund because it had failed to comply with Denver's administrative procedures.

The lower court rulings concerning the scope of 11 U.S.C. § 503 and Continental's entitlement to a refund have not been presented to the Court for review. Accordingly, this Statement will not address those issues.

(*See* Appendix C at C26-C27.) In the alternative, Denver argued that even if the term "facility" in the original ordinance could be construed to encompass a multi-building facility, Continental did not meet the square footage requirements because, although Continental leased more than one million square feet of usable space, some of that space had been subleased and other space was not then currently being used by Continental. Thus, according to Denver, the facility Continental was actually using in fact had less than one million square feet of usable space. (*See* Appendix D at D14.) Finally, Denver asserted that the August 1991 ordinance that purported to clarify the definition of an eligible facility contained in the original ordinance did not violate the state constitutional prohibition against retroactive legislation. In Denver's view, under state law it had the power to eliminate tax exemptions retroactively, at least before a tax year was closed. Moreover, according to Denver the second ordinance was merely "clarifying" legislation and as such did not constitute retroactive legislation within the meaning of the state constitution. (*See* Appendix A at A14-A17.)

The Bankruptcy Court analyzed the questions under Colorado law, which both parties agree is controlling. The court found that – like most states – Colorado's approach to statutory construction is grounded in the plain meaning rule. Specifically, the Court found that under Colorado law, where the language of a statute or ordinance is unambiguous, it would be inappropriate to read qualifications into the statute or ordinance on the basis of extrinsic materials. Rather, the meaning of the statute or ordinance is to be determined by looking at the language

actually used in the legislation and giving that language its ordinary meaning. (*See* Appendix D at D12) *citing City of Littleton v. Board of County Commissioners*, 787 P.2d 158, 161 (Colo. 1990) *and* Colo. Rev. Stat. Ann. § 2-4-101(1991).

Applying Colorado's plain meaning rule, the Bankruptcy Court found that it would be inappropriate to limit the exemption created by the original ordinance solely to a new maintenance facility having a single building containing at least one million square feet of usable space precisely because Denver had *not* included those qualifications in the ordinance it had originally enacted. Giving the term "facility" its ordinary and common meaning, a multi-building complex used jointly by a company for the purpose of accomplishing a common task was plainly a "facility". Thus, as a matter of law, Continental's multi-building complex was a "facility" within the meaning of the original ordinance. (*See* Appendix D at D12-D14.)

The Bankruptcy Court also relied on the plain meaning rule to reject Denver's argument that the square footage requirement in the original ordinance required the exclusion of subleased and unused space. Again, because the language used in the original ordinance did not exclude subleased and unused space in defining a qualifying facility, the "space actually used" qualification urged by Denver was in effect an attempt to use extrinsic evidence in order to read limiting language into the statute. Thus, because the parties agreed that the space Continental leased for its facility exceeded the minimum square footage specified in the statute, and also agreed that Continental's facility was located in an enterprise

zone and met the employee reporting requirements, Continental was eligible for the exemption under the plain meaning of the original ordinance. (*Id.* at D13-D14.)

With respect to the supposed "clarifying" ordinance, the bankruptcy court found that, when stripped of rhetoric, the alleged "clarifying" ordinance was nothing more than an attempt to tax a transaction that had been tax-free when completed. The court then held that such an attempt constituted retroactive legislation within the meaning of the state constitutional prohibition. Accordingly, the court found that the "clarifying" ordinance could not retroactively deprive Continental of the use tax exemption to which it was entitled under the original ordinance. *Id.* at D16-D18 (*relying on California Co. v. Colorado*, 141 Colo. 288, 348 P.2d 382, 399 (1959), *app. dismissed*, 364 U.S. 285 (1960) and *Van Sickle v. Boyes*, 797 P.2d 1267, 1270-71 (1990)).

After being rebuffed by the Bankruptcy Court, Denver appealed to the district court. On appeal, the district court found that Continental was not entitled to the exemption for three reasons. First, the district court found that the term "facility" was ambiguous, and that accordingly Colorado law permitted resort to extrinsic evidence of legislative intent. (*See* Appendix C at C25.) In the district court's view, the extrinsic evidence proffered by Denver supported its argument that the term "facility" in the original ordinance was intended to apply only to a new maintenance facility consisting of a single building containing at least one million square feet of usable space. (*Id.* at C27.) Second, the district court held that even if a multi-building facility could fall within the definition of "facility" used in the ordinance, Continental

would not be eligible for the exemption. In the district court's view, Continental's facility did not satisfy the square footage requirement in the original ordinance because Continental's decision to sublease part of its leasehold and leave other portions unused meant that the multi-building facility actually being used by Continental contained less than one million square feet of usable space. (*Id* at C30.) Finally, focusing on a requirement in the original ordinance that had not been addressed by the bankruptcy court, the district court found that a condition precedent to claiming the exemption was the taxpayer's creation of a reserve fund into which the tax savings were to be deposited. In the district court's view, Continental's failure to establish such a fund meant it was not eligible for the exemption. (*Id.* at C32-C33.) Because the district court found that Continental did not qualify for the exemption under the original ordinance, it did not reach the question of retroactivity. (*Id.* at C32-C33.)

Continental then appealed to the Third Circuit. In an unreported opinion, the Court of Appeals reversed and held the district court had misread the Colorado authorities concerning application of the plain meaning rule. Under Colorado law, the district court's decision to go beyond the common meaning of the term "facility" and engraft limitations gleaned from extrinsic sources was improper. (*See* Appendix A at A10-A13 *citing, inter alia, Kane v. Town of Estes Park*, 786 P.2d 412, 415 (Colo. 1990) (*en banc*), *Triad Printing Co. v. Blair*, 812 P.2d 638, 644 (Colo. 1991) (*en banc*), and *Catholic Archdiocese of Denver v. City and County of Denver*, 741 P.2d 333, 337 (Colo. 1987)

(*en banc*)). Using the common meaning of the term "facility" as required by Colorado law, the Court of Appeals found that Continental's multi-building complex was a qualifying facility within the plain meaning of the language used in the original ordinance. Applying the plain meaning rule to Denver's "space actually used" argument, the Court of Appeals found that because the language of the ordinance did not distinguish between subleased space, unused space and used space in determining whether a facility met the ordinance's square footage requirements, it would be improper for a court to read such a limitation into the ordinance. Thus, the Court of Appeals found the district court had also violated the plain meaning rule by reading a distinction between used and unused space into the ordinance. (*Id.* at A10-A12.) Turning to the reserve fund requirement, the Court of Appeals ruled that the district court had committed error by holding the reserve requirement applicable to Continental. Again, the Court of Appeals found the district court had ignored the plain language of the ordinance, which plainly provided that the reserve fund requirement was not applicable to a facility (like Continental's) in existence at the time the original ordinance was adopted. (*Id.* at A10-A14.)

Finally, the Court of Appeals found that Denver's attempt to change the definition of a qualifying facility retroactively did indeed violate the state constitutional prohibition against retroactive legislation. Accordingly, it found that, under state law, Denver's enactment of the so-called clarifying ordinance did not vitiate Continental's entitlement to the exemption under the terms of the original ordinance. (*Id.* at A14-A17.)

Argument

1. Petitioner implies that review is necessary to avoid future conflict between the opinion of the Court of Appeals and other courts concerning rules of statutory construction. That assertion is incorrect. The Court of Appeals designated its opinion as "not for publication". Under United States Court of Appeals for the Third Circuit, Internal Operation Procedures, Rules 5.1.3 and 5.5.1, an opinion designated as "not for publication" has precedential value only for the trial court and parties. Thus, there is no realistic possibility of any future conflict between the opinion of the Court of Appeals and the opinion of any other court.

2. Petitioner's assertion that the decision of the Court of Appeals is in conflict with decisions of other federal courts of appeal and of this Court concerning rules of statutory construction is also incorrect. The decisions of the other federal court of appeals and this Court cited by Petitioner involve questions of federal law or the law of other states. None of those decisions involves Colorado law, which was the sole basis for the opinion of the Court of Appeals. Thus, Petitioner has failed to demonstrate the existence of any conflict between the decision of the lower court and the decisions of other federal courts of appeal or this Court.

3. Petitioner's assertion that the decision of the Court of Appeals is in conflict with Colorado law is also incorrect. On the issue of statutory construction, the Colorado Supreme Court has repeatedly stated that resort to extrinsic materials is unnecessary and inappropriate where statutory language is clear and the legislature's

intent can be ascertained by construing the terms actually used in a piece of legislation in accordance with their ordinary and common usage.

Thus, for example, in *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991), the Colorado Supreme Court stated that under Colorado law, a court's task in construing a statute is to "determine the intent of the legislature as expressed in the language it selected." (*Id.* at 644.) Similarly, in *Kane v. Town of Estes Park*, 786 P. 2d 412 (Colo. 1990) the court stated that the legislature's intent is to be determined by "look[ing] first to the statutory language. When the statutory language is plain, our inquiry need go no farther." (*Id.* at 415.) In *City of Littleton v. Board of County Commissioners*, 787 P.2d 158 (Colo. 1990), the court reiterated that determining legislative intent is a court's primary task when interpreting a statute, and that the proper way to go about determining legislative intent is to first look at the language of the statute. (*Id.* at 161.) All of these cases referred to *Kern v. Gebhardt*, 746 P.2d 1340 (Colo. 1987), where the state supreme court succinctly summarized Colorado law on this issue:

> Our primary task in construing a statute is to determine and give effect to the intent of the General Assembly. . . . To discern legislative intent, we look primarily to the language of the statute itself and then give effect to the statutory terms in accordance with their commonly accepted meaning. . . . When the statutory language is plain, it should not be subjected to a strained or forced interpretation.

Id. at 1344 (citations omitted).

The approach approved by *Triad Painting Co., Kane, City of Littleton* and *Gebhardt* is precisely the approach taken by the Court of Appeals. Looking at the language of the statute, the court found that the term "facility" did indeed have a plain and ordinary meaning, and that meaning – as reflected in legal and other dictionaries – plainly encompassed a multi-building complex used to perform a common function. (*See* Appendix A at A10-A12.) Accordingly, the court rejected Petitioner's attempt to qualify the term "facility" through the use of extrinsic evidence.

Similarly, the Court of Appeals rejected Petitioner's attempt to read qualifications into the square footage requirement not found in the language of the ordinance, and to apply the reserve fund requirement to Colorado when the statutory language plainly did not extend that requirement to facilities already in existence when the ordinance was passed.

Thus, it is incorrect to say that the decision of the Court of Appeals somehow ignored controlling Colorado case law and is therefore in conflict with state court decisions. To the contrary, the Court of Appeals followed controlling case law, and therefore its opinion could not have been, and was not, in a conflict with controlling state court decisions.

Denver's assertion that the Court of Appeals erred when it interpreted the state constitutional prohibition against retroactive legislation is also incorrect. Again, the

Court of Appeals looked to the leading state court decisions defining retroactive legislation, and applied those decisions to the facts of the case.

The leading Colorado decision on this issue was *P-W Invs., Inc. v. City of Westminster*, 655 P.2d 1365 (Colo. 1982) (which followed the definition of retroactive legislation first announced in *Denver, South Park & Pacific Ry. Co. v. Woodward*, 4 Colo. 162 (1878)), and *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo. 1990), which follows *P-W Invs.* and *Woodward*. All of these decisions define retroactive legislation as encompassing an effort to "attach[ ] a new disability, in respect of transactions or considerations already past". The Court of Appeals found that Denver's attempt to rewrite the original ordinance was an obvious attempt to impose a tax on a transaction that was tax-free when completed, and therefore fell squarely within the prohibition against retroactive legislation articulated by Colorado's state courts.

The Court of Appeals also considered, and rejected, Petitioner's attempt to narrow the definition of retroactive legislation followed by Colorado courts since 1878. Thus, the Court found that Petitioner's argument that the ordinance seeking to make a retroactive change in the definition of "facility" was merely a "clarifying" ordinance, lacked credibility, and also found *Martin v. Board of Assessment Appeals*, 707 P.2d 348 (Colo. 1985), upon which Petitioners rely, to be distinguishable. The Court of Appeals recognized that *Martin* upheld a mid-year change in property tax rates against a retroactivity challenge. It found, however, that *Martin* was not applicable to the use tax controversy for two reasons. First, the transactions at issue in *Martin* were not completed at the

time the law was changed, as contrasted with the use tax transactions, which had been completed at the time the city council attempted to make a retroactive change in the scope of the exemption. Second, the change at issue in *Martin* did not involve an attempt to add a new tax liability to a discrete transaction, while the attempt to impose a tax on a transaction that was tax free when completed, obviously did.

Thus, again, it is incorrect to assert that the opinion of the Court of Appeals is in conflict with controlling state law. Rather, the opinion of the Court of Appeals shows that the court was aware of the controlling state law decisions, applied those decisions to the facts before it, and reached a conclusion that was consistent with the leading state court decisions.

Conclusion

As noted above, the Court of Appeals resolved the questions before it by applying controlling state law. Because only state law issues were decided by the Court of Appeals, its decision did not in any way involve a question of federal law or policy. Thus none of the grounds for review set forth in Supreme Court Rule 10.1 are present. Indeed, Petitioner does not even attempt to assert that the decision of the Court of Appeals implicates

any of the considerations set forth in Rule 10.1. Accordingly, as stated above, further review is neither necessary nor warranted.

Respectfully submitted,

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February, 1994

No. 93-1154

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In The

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Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

1. Whether an opinion of the Court of Appeals must be a published opinion in order to be subject to consideration for Review on Writ of Certiorari.

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ARGUMENT

I. Unpublished Cases in the Court of Appeals may be reviewed by the United States Supreme Court.

Respondents ("Continental") contend that because the United States Court of Appeals for the Third Circuit ("Court of Appeals") has designated its decision in this matter as "not for publication", the Court of Appeals' decision automatically does not conflict with the opinion of any other court, and thus, is not subject to review on writ of certiorari. *In re Continental Airlines, Inc.*, No. 93-7088 (3rd Cir. September 20, 1993) (not selected for publication), reh'g denied (October 21, 1993). App. A1-A24. This theory has no legal basis, and conflicts with the obvious purpose of Rule 10.1, United States Supreme Court Rules ("Supreme Court Rules"), and of 28 U.S.C. § 1254(1) (1940 ed.): To place review on writ of certiorari within the sound judicial discretion of the United States Supreme Court.

This Court is granted broad jurisdiction to review cases in the courts of appeals under 28 U.S.C. § 1254 (1940 ed.) ("By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."). Section 1254 and Supreme Court Rule 10.1 do not distinguish between published and unpublished opinions. Rule 10.1 states:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

> The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals *has rendered a decision* in conflict with a decision of another United States court of appeals on the same matter; *or has decided a federal question* in a way in conflict with a state court of last resort; *or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court,* as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals *has decided an important question of federal law* which has not been, but should be, settled by this Court, *or has decided a federal question* in a way that conflicts with the applicable decisions of this Court.

(emphasis added).

Any contention that only published opinions of the courts of appeals are subject to certiorari review is incorrect. Indeed, in the past seventeen months, this Court has granted certiorari on and decided at least three cases where the decision of the court of appeals, from which review was sought, was not selected for publication. *Weiss v. United States,* No. 92-1482, ___ U.S. ___, 127 L.Ed.2d 1 (January 19, 1994) (Decided together with *Hernandez v. United States,* certiorari granted on unpublished Military Court of Appeals decision); *United States v. Edge Broadcasting Co.,* No. 92-486, ___ U.S. ___, 113 S.Ct. 2696,

125 L.Ed.2d 345, 354 n. 3 (June 25, 1993) ("We deem it remarkable and unusual that although the Court of Appeals [4th Cir.] affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion."); *Shalala v. Schaefer*, No. 92-311, ___ U.S. ___, 113 S.Ct. 2625, 125 L.Ed.2d 239, 246 (June 24, 1993) ("The Eighth Circuit . . . affirmed the District Court in an unpublished per curiam opinion. . . . We granted certiorari.").

This Court's review on certiorari should not turn on the differences among circuit courts' local rules, which differ in their standards for determining the publication of their opinions. For example, Local Rule 36.2.5 of the United States Court of Appeals for the First Circuit provides, "If a District Court opinion in a case has been published, the order of the court upon review *shall* be published. . . . " U.S.C.S. Ct. App. 1st Cir. R. 36.2(b)(5) (1993) (emphasis added). *See* U.S.C.S. Ct. App. 7th Cir. R. 53(c)(1)(v) (1993); U.S.C.S. Ct. App. D.C. Cir. R. 14(a)(6) (1993) (opinion published when decision reverses published District Court opinion); U.S.C.S. 10th Cir. R. 36.2 (1993) (When an opinion below has been published, this court will ordinarily designate its disposition for publication.) In this matter, both the District Court and Bankruptcy Court opinions were published. *In re Continental Airlines, Inc.*, 138 B.R. 430 (Bankr.D.Del. 1992); rev'd 23 Bankr.C.D. 1499, 149 B.R. 76 (D.Del. 1993).

Moreover, the Third Circuit's opinion in this matter may be cited as precedent or as persuasive authority in

unrelated cases before other circuit courts. The Fifth Circuit's Local Rule 47.5.3 reads "Unpublished opinions are precedent. . . . If an unpublished opinion is cited, a copy shall be attached to each copy of the brief." U.S.C.S. Ct. App. 5th Cir. R. 47.5.3 (1993). Similarly, Local Rule 10(f) of the Sixth Circuit states that "If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that will serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court." U.S.C.S. Ct. App. 6th Cir. R. 10(f) (1993). The Eleventh Circuit allows unpublished opinions to be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion, or response. U.S.C.S. Ct. App. 11th Cir. R. 36-2 (1993).

Continental relies on Rules 5.1.3 and 5.5.1 of the Court of Appeals' Internal Operating Procedures ("IOP") to support its position. These Rules do not provide a legal basis for the Supreme Court to deny review on certiorari. Rule 5.1.3 merely states, "When a majority of the panel believes that publication of the opinion is not necessary, the opinion may be written as a signed opinion, but designated as ~~not for~~ publication. Such an opinion, after approval by the panel, circulates to all active judges as provided by IOP 5.3." Similarly, IOP Rule 5.5.1 provides, in part, that the decision of whether to publish an opinion lies within the discretion of two of the three Third Circuit panel judges.

A lower federal or state court cannot avoid review in this Court simply by not selecting its opinions for publication. Supreme Court Rule 10.1 does not intend to limit the broad discretion and jurisdiction of this Court to the review of only published opinions. Therefore, it is axiomatic that the jurisdiction of the United States Supreme Court extends over both published and unpublished opinions.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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